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THE RECONSTRUCTION AND CODIFICATION OF INTERNATIONAL LAW [1]

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I. Codification of International Law is only one of many contributions to the new international order

The social cataclysm from which we have just emerged has undoubtedly resulted in radical transformations in the international relations both of Europe and the American continent. Europe, partly devastated, now finds itself in a most critical international, economic, and social position. It is, moreover, divided into two distinct parts, opposed to each other in many respects and above all in ideology. As for the American continent, the United States, abandoning its traditional isolationism, is exercising a considerable influence on the international relations of Europe; the New World as a whole has already so far developed its Pan-American policy that that continent may be said to constitute a thorough-going international society.

At the same time profound changes have taken place, especially

[1] This article epitomises the conclusions reached by M. Alvarez, the distinguished judge of the International Court of Justice, after several years of close study of the codification of international law, and also embodies the main points included in his Report to the Institute of International Law at the Lausanne Conference of August, 1947. [Edit.]

from the psychological point of view, in all parts of the world, particularly with regard to the recognition of individual human rights in order to assure to all peoples a greater material well-being and social and educational development; there is also a desire to see wars banished and co-operation between all the States of the world established. Lastly, scientific discoveries of outstanding importance have recently been made, the practical applications of which in the future cannot as yet be clearly foretold.

All these transformations account for the uncertainties and difficulties of the present time, but it is permissible to hope that the future will not be as black as the pessimists would have us believe. What we are witnessing in fact is the end of one epoch of civilisation. It has run its course and we are on the threshold of a new era, the greatest in the history of mankind. The task falls upon our generation of preparing for and directing the realisation of this new epoch, the 'New Order' which it will unfold. With this aim before us, it behoves us to study from as broad a standpoint as possible the life of the international community in all its present manifestations.[2] To my way of thinking, the establishment of the 'New Order' can best be considered from several major aspects, of which the reconstruction of international law and its codification are but one.

II. The importance ascribed today to the codification of international law for peace. The conditions to be fulfilled in undertaking this codification

The profound transformations of which mention has already been made as well as the oft-repeated violations of the law of nations in recent times, together require that this law should be submitted to full investigation and critical analysis. On many sides it is felt, however, that the codification of the law of nations would materially help in re-establishing its prestige: thus article 13 of the Charter of the United Nations, the Grotius Society[3] and the International Law Association. Before the work of codification can be embarked upon, and in order to decide on the best method to follow, it seems necessary to determine the nature and content of this law as well as its present condition. In my view the subject can best be

[2] See my *La Reconstruccion del Derecho de gentes. El nuevo Orden y la Renovacion social*, Santiago de Chile, 1946.

[3] 'A plea for the codification of International Law on new lines', paper read by Sir Cecil J. B. Hurst, President, before the Grotius Society on October 10, 1946. See *International Law Quarterly*, Vol. 1, p. 38.

embraced as a whole by a general examination under the eleven heads (a–k) set out in the next part of this paper.

III. THE RECONSTRUCTION OF INTERNATIONAL LAW

(a) *Nature of International Relations. Ruling principles, in particular the Law of Nations. Characteristics of this Law.*

Until modern times, so-called international relations were conditioned according to the good pleasure of the sovereign, that is to say by politics; these were considered neither as moral nor as immoral but as amoral. Force played the dominant rôle in these relations. This period of history saw the earliest beginnings of a customary behaviour in inter-State relations, but this could not strictly be described as an international law. It was not until the sixteenth century that the progress of civilisation and the drawing closer together of States brought about a conviction in the countries whose civilisation was in origin Western European, that the reciprocal relations of States should be subject to juridical rules. This was the beginning of the law of nations. Its domain was still restricted. Only States were the subject of this law and they remained sovereign masters in the conduct of relations with other States. These were simple in nature and not manifold as they are today, so that nearly all of them could be made the subject of legal rules. The law of nations which was thus formulated was founded on a so-called *individualist regime*. Its object was to delimit the rights of States. It was not concerned with their duties towards the community or the community's general interest. This law rested, moreover, on certain postulates, the result of speculation or drawn from eighteenth century philosophy, the two most important of which were the essential juridical nature of the law of nations and the universality of its precepts. Since those days custom and the writings of publicists have brought about a considerable development of international law and instances have not been lacking when States have regarded certain rules laid down by the jurists as being in force and have applied them in their relations with other States, at least when they were not at variance with their essential interests.

(b) *The present crisis in the Law of Nations. Its causes. Measures proposed for overcoming the crisis.*

Since the middle of the nineteenth century the conception and structure of international law have been undergoing a radical transformation as a result of the circumstances outlined at the beginning of this article. The crisis in international law is due to the failure

both of jurists and of States to take sufficient account of these circumstances and of the modifications that have taken place in the life of the international community. The conception, the structure, and many of the principles of international law are not in harmony with the new conditions prevailing in international life, and this is so far true that on the one hand it can no longer be said with precision which precepts of international law are at present in force, even in respect of fundamental matters, and that on the other hand these precepts, whatever notoriety they may otherwise enjoy, have been the object of repeated violations.

Two consequences result from this crisis : many people now tend no longer to believe in the efficacy of international law but only in the efficacy of treaties made between States, while States are often fearful of strictly juridical solutions which do not always appear to conform to the realities of international life, and prefer solutions based on political expediency or compromise.

Various solutions have been suggested for overcoming this crisis. Some publicists have stressed the importance of selecting from the general body of the law of nations as it has been handed down to us those precepts which are manifestly in force, and discarding those which in fact have fallen into disuse or have no practical value. Others, and they are the larger number, go further, and hold that the only way to restore the prestige of international law is to carry out its codification. But they are not in agreement by whom this work should be done or in what manner it should be carried out.

(c) *Necessity for the reconstruction of International Law. What it consists in. Method to be employed.*

The task that confronts us at the present time if we wish to overcome the crisis in international law and permit of its future development in harmony with international life, is a more fundamental one than that which has been proposed : it is the *reconstruction* of international law. By this I mean a rigorous criticism of its whole conception, its basis, and its principal doctrines, in order to bring them into harmony with present-day international circumstances. As to the method to be employed, it is clear that we must have regard to the whole span of international life as well as to its whole depth. By the former expression I mean that we must look beyond Europe and survey all the continents, not forgetting Asia, North Africa and the Moslem world, though taking Europe and America particularly into account. Many new principles and doctrines of great importance formulated in the New World have so far been neglected or misunderstood elsewhere.

We must study, moreover, international life in all its depth, that is to say, we must consider not only the material but also the immaterial factors which are involved, the 'imponderables' often spoken about without more accurate definition. Of these the most important are psychological in nature; they are sentiments of one kind or another, such as national sentiment, the sentiment of international good neighbourliness, anti-social sentiment, as well as ideals, states of mind, doctrines, etc. The nations are guided in their international relations much more in reality by psychological factors such as these, or by economic considerations, than they are by reason or justice.

The causes of wars and social unrest which periodically afflict humanity are themselves, moreover, essentially psychological in nature, and particularly in our epoch the part played by national psychologies is of capital importance.

It appears to me that a study on the lines I have suggested will promote two new branches of study closely inter-related, which I may call 'the science of international life' and 'the science of national psychologies in international affairs'. I have sketched out the respective spheres of these two branches of study in the book to which I have previously referred.

(d) *Transformations in international life since the middle of the nineteenth century. Conclusions to be drawn therefrom for the reconstruction of International Law.*

Since the middle of the nineteenth century evolutionary factors previously unknown, both material and immaterial, have been profoundly transforming the face of international relations. First of all, in their relations with each other, States have been increasingly guided by sentiment and interest rather than by reason and logic. Secondly, international life is at present displaying a dynamic quality of a most disconcerting kind: barely have international relations been stabilised than they are again immediately modified. These relations, moreover, are very different in character today from what they used to be. They are now numerous, variable, complex and inter-connected. They present various facets at one and the same time: political, economic, social and so forth. It seems, therefore, impossible to continue to subject them all to the juridical rules with which we are familiar today.

The so-called *individualist regime* which constituted the basis of social and international life until the middle of the last century has little by little been succeeded by the new regime of *social interdependence*. This expression does not imply a limitation on the

independence of States but a change in the very basis of the individualist regime. Under the latter, the State in international life, like the individual in the nation, was the centre of life and action. Everything else was subordinate thereto; State interest or individual interest seen in isolation alone mattered. This conception must be altered; it is the general interest of the international community alone which must henceforward be considered. It is on a clear understanding of this interest that the rights of States and individuals must be modelled.

As a result of this transformation the conception of the law itself has changed. The individualist law which aimed simply at defining the rights of States and individuals, having regard only to their interest, is beginning to make way for a law which may be called the *law of social interdependence*, the object of which must be not merely to define these rights but to bring them into harmony with each other, insisting on the duties of States and individuals towards international society, and giving as important a place as possible to the general interest. This law is in fact nothing but the consecration of that *social justice* that is often spoken of today, albeit in the limited context of the individual and his material well-being. For the present we are in a *period of transition*, since the new regime of interdependence and the new conception of law are not definitely established. It is important that this transition should be hastened.

Another element in the situation is that within the last century the peoples themselves have entered the international scene. With them there has come a juridical conscience, manifesting itself in various ways, particularly in the forms of *public conscience* and *public opinion*, which, when they are uniform, can exert a considerable influence on international relations. Amongst the peoples, too, there is developed a sentiment of neighbourliness which extends far beyond national frontiers. It is the sentiment of international good neighbourliness already referred to. In any people it is the *elite* that matters, for it is the elite which exercises a decisive influence on the national life of a country as well as on its rôle in international affairs. Governments which were formerly absolute sovereigns both at home and abroad have come increasingly to take into account this new social force. The most important factor in the psychology of peoples is their national sentiment, which, when it is intense and egoistic, gives cohesion to the State, thereby inevitably impeding international good neighbourliness and causing discord and war. Conversely, State egoism is held in check in proportion that sentiments of international

sociability are developed. As regards the operation of politics in international affairs this may be seen in one of four lights : as the complement of international law, as running counter to it, as making up for the failings and gaps in international law, or as bringing about its own solution of questions for which no juridical solution is available. Policy is of course frequently supported by force. It must be stressed that many international relationships and litigious questions turn upon a political element. The Council of the League of Nations, it should be pointed out, had regard only to considerations of this sort for the solution of disputes that were referred to it. The same is true of the Security Council of the United Nations. From these organisations it is, as one might say, a kind of collective policy which results. We must hope, rather than that politics should be condemned outright, to see them in future controlled within the principles of international law and morality.

Nor need we condemn absolutely the results of the exercise of force, in particular consequent upon acts of war, as the Pan-American Conferences have done. Out of war, situations of fact arise to which regard must be had. Public international law in Europe has been crystallised out of major wars and the recent social cataclysm will import new changes into the political map of Europe which the law of nations will have to take into consideration. Another fact which cannot be disregarded is that war is a social and psychological phenomenon which only factors of the same order can cause to disappear. Wars in their turn react on the psychology of peoples and after such upheavals as those of 1914–1918 and 1939–1945, it is possible to bring about the introduction into international life and law of modifications of an extent that would have been out of the question in normal times, except perhaps after great delay. It is useless, however, to attempt to impose on public opinion transformations which are not generally acceptable. This consideration is of great importance in international life, particularly in everything that concerns international organisation and the introduction into international law of the concept of interdependence.

Recent events have demonstrated something else, namely, that the political regimes of the great Powers exercise a considerable influence on international law. It is clear that had the Axis countries been victorious in the last war, international law would have taken a very different form from that which the Democracies are seeking to establish.

(e) *Results of the reconstruction of international law, as they affect its conception and nature.*

The work of reconstruction of international law leads us to a conception of this law very different from that traditionally accepted. Most important of all it takes shape as real law in the sense that its precepts are binding upon States. In this it is distinct from international morality whose precepts have not this compulsory character. One may frequently hesitate before deciding whether one is confronted with a precept of law or a precept of morality, social progress consisting as it does in the gradual transformation of moral precepts into legal rules.

But law has not only a juridical character, it has at the same time political, social and psychological aspects. The psychological character of the law of nations, itself a consequence of the psychological character of international life, is apparent particularly in the origin and basis of this law, as we have seen. The carrying out of the precepts of the law of nations is naturally dependent on the development of juridical conscience and custom, but in contrast to other positive systems of law, international law requires certain psychological conditions to be fulfilled. There must be a desire for order, a spirit of justice, good faith, confidence, a spirit of co-operation, and so forth. Without these, international law is paralysed and its precepts easily violated. The egoism of States and the notion of their absolute sovereignty are elements which hinder the carrying out of juridical precepts. It is because America is more convinced than is Europe of the virtues of international good neighbourliness that the law of nations there enjoys greater respect.

The precepts of this law cannot be enduring unless what I have called public conscience is under the firm impression that they are not outmoded. If this impression is lacking, the precepts are themselves the more easily violated. Courtesy is a very important element in international life and one that is essentially psychological. A discourteous international act is frequently viewed in a graver light than a violation of a secondary juridical obligation.

Because of their psychological character not all juridical precepts have the same practical value; those that have their origin in a convention are normally the most commanding of attention, while their violation most easily causes public alarm and constitutes for the interested countries a sufficient offence to be a legitimate reason for war. It also frequently happens that a contractual obligation will be purposely avoided where a mere moral obligation will be undertaken. In brief, I find inadmissible the widely held opinion (which is also a postulate of traditional international law) that all

the precepts of this law have the same binding force. Another result of their psychological character is that the precepts of international law are not co-extensive in their action; some may be universal in range, others limited to operate within a continent. Hence also we find different schools of international law: Anglo-Saxon, Continental, Pan-American, Soviet, etc.

(f) *Results of reconstruction of international law as seen in its essential elements.*

Since the international community has become a true society, albeit very different in kind from the society which is a nation, the basis of international law can no longer be individualism but must be social interdependence. Moreover, international law has acquired new subjects: continents, groups of States, races, nations, minorities, international associations, international persons, and in some cases the individual. A special study is thus necessary, aiming at a clear definition of the international personality of these new subjects of the law of nations. It is apparent from what has just been said that this law has ceased to be an inter-State law and has become truly international.

The *domain* of international law may be considered under five aspects :—

1. The relations between the different subjects of international law;

2. The traditional territorial, fluvial, lake and maritime domains, to which must now be added the domains of the air, floating islands, and the Polar regions. Each of these domains has its particular physiognomy, and rules applicable to one may have no bearing on another, for example, in questions of transport;

3. Matters that formerly lay exclusively within the domain of national law are increasingly becoming internationalised. We have witnessed the beginnings of an international civil law and an international labour law amongst others;

4. The domain of international law has been further extended as a result of new relationships between States as well as of new doctrines or ideas, such as the notion of international crime;

5. Into the domain of international law enter also all matters concerning international organisation.

(g) *Results of reconstruction in their bearing on the major principles of international law.*

The principles of international law must be distinguished from its rules. The principles are the all-embracing conceptions which

pervade international life as a whole or a particular aspect thereof. They do not always derive from the express or tacit will of States but often, as we have seen, from juridical conscience. States can neither disregard nor abrogate principles (*e.g.*, the honouring of the pledged word) with an origin such as this. Rules of international law are the dispositions that usually, though not always, originate in the will of States, at whose good pleasure they may be modified. The principles are of outstanding importance in the law of nations and the task should be undertaken of 'formulating the general principles in harmony with the juridical conscience of the civilised world'.[4] In my opinion this formulation can best be attempted by a combined effort on the part of the various scientific societies devoted to the study of international law aiming at the drawing up of a 'Draft Declaration of the Major Principles of Modern International Law'.[5]

(h) *A declaration of major principles will establish the law as one of social interdependence. It determines the nature of the so-called fundamental rights of States.*

Some of the principal characteristics and innovations introduced by such a declaration of principles as I propose may be noted. Firstly, the Declaration is only concerned with principles that are really universal in character and does not provide for exceptions based on usage within a continent or the doctrines of a particular school. However, the States of a continent, if the interest of that continent so require, may modify these principles by express declaration. Secondly, in formulating these principles, international relations are considered in all their aspects, political, moral, psychological, and so forth. Thirdly, the law of social interdependence and social justice in its wider sense are stressed to the maximum extent consistent with realities. Duties as well as rights of States are established (Sections 4 and 5). Some duties which previously were merely moral in character have acquired juridical force. So far is this true, that in certain cases the exercise of a right cannot be insisted upon if the corresponding duty has not been fulfilled (Articles 25 (*b*), 28, 29, 30, 32, para. 2). Fourthly, the so-called fundamental rights of States such as independence, sovereignty, juridical equality and non-intervention are seen in their true perspective, and to their number is now added that of

[4] One of the objects of the Institute of International Law as given in the Institute's Statutes.

[5] Such a Draft Declaration was printed in the Report of the International Law Association, Vol. 39 (1936), and in Vol. 3 of the *Dictionnaire Diplomatique*, Title *Codification*.

personality. The State is a juridical person and it is on this person that fundamental rights are conferred, not on a group of individuals, however great in number they may be, who cannot pretend to an international juridical personality.

(i) *The 'Declaration of Major Principles' and the international rights of individuals and international persons.*

There is considerable discussion at the present time about the necessity of working out a declaration of the rights and duties of States, and great stress is also laid on the value of a Declaration of the rights of the individual. We see here one manifestation of the present reaction against the absolutism of States and totalitarian regimes. Yet a proclamation of the rights of the individual should not have as its sole object to impose a limitation on the absolutism of States. It should also aim at bringing them into harmony with the demands of community life and the general interest. The interest of the community which is the mainspring of life under a regime of social interdependence, far from running counter to the rights of the individual, does precisely the opposite. It confirms and enhances them, while at the same time it presents them in a new light. Under the individualist regime it could be affirmed that the individual enjoyed absolute rights, deriving their force from natural law, which States were bound to respect. Under the regime of social interdependence, and in accordance with the new conception of positive law which it entails, there are no rights inherent in human nature and founded on natural law; all law derives from the life of the community and is developed to the extent that community life requires. Under this new regime the individual enjoys a greater number of rights than formerly, the right to education, to work, to relief, amongst others. All these rights, however, are limited in scope by the same social interest that brings them into existence. Thus the right to property is no longer an absolute one. There is widespread agreement, as is borne out by the more recent Constitutions, that property is no more than a 'social function'.

Insistence must also be laid on the duties of individuals towards society as well as their rights. Under the individualist regime this element was lacking. The rights and duties of international persons and associations must also be made clear.

Finally, such a declaration must be truly international in the sense that the carrying out of duties and the enforcement of rights should be capable of being insisted upon in any country whatever.

(j) *Application, interpretation, and development of international law.*

By the application of law we understand the manner in which existing law is brought into operation in particular cases. The interpretation of the law is concerned with the uncertainties it may contain, and its development is concerned with gaps in its structure and fresh sets of circumstances demanding a legal solution. The law of nations is applied, interpreted and developed by national authorities, by States, by the teachings of publicists and by international tribunals. The criteria applied by the national authorities vary according to whether it is the executive, legislative, judicial or administrative power in the State that is investigating the question: but in all these cases national interest predominates. The same is true of inter-State relations, the mainspring of which is principally political. The teachings of publicists were founded in the main on notions of justice and equity. The practice of international tribunals, in cases where the arbitrator found no juridical principles that could be applied, was to abstain from delivering judgment unless the parties had expressly agreed that recourse might be had to an alternative method of settling the dispute. Matters have now changed. Standard doctrine now admits that in the absence of express dispositions in a legal text, a matter which is not juridical must be settled by a political approach, whereas, if it is juridical, recourse must be had to the general principles of law, the precepts of justice and notions of equity.

The conception of justice will always be social in character (see Sections 7 and 8 of the Declaration). International justice, like international morality, evolves as civilisation progresses and the intellectual level of peoples is raised. Formerly it took its inspiration from absolute and abstract law and from logic. To these it must today add elements of a social character.

International tribunals have heretofore shown themselves very conservative and traditionalist, never overstepping a strict application of existing law. Article 38 of the Statute of International Court limits the law to be applied by the court to existing law. In my view this practice should be modified, for if the law of nations is to enjoy prestige it must march in step with international life. Decisions that are strictly juridical in character, and a clear and logical argument, have a seductive attractiveness, but international tribunals, in view of the dynamism of international life, ought in my view to have regard not merely to the existing law; they should improve upon it, develop it a stage further, or even where necessary set up new precepts. They would have the support of world public opinion in so doing. There is no innovation in this.

The national courts of the various countries proceed in this manner. To bring law into harmony with the everchanging demands of social life is a duty which international tribunals cannot evade. If they proceed on these lines they will powerfully assist the renewal of international law and contribute greatly to its prestige.

(k) *Need of a new method of study of international law.*

It no longer suffices to conduct a systematic study of the various items constituting the subject-matter of the law of nations solely from the juridical aspect. The development of international life as a whole, at any rate in general terms, the nature and characteristics of inter-State relations in the various periods of history and the elements controlling these relations, particularly politics and the law of nations, must form the proper subject-matter of our future study. Special attention should be paid to the causes of war and of social unrest and to the methods by which these may be eradicated. It is not a valid objection to this proposal that such is already the object of the study of international relations, as distinct from that of the law of nations. I should like to see hand-in-hand with the study of international law the development of two new and closely inter-related sciences, the ' science of international life ' and the ' science of national psychologies in international affairs '.

THE UNIFICATION OF MARITIME AND COMMERCIAL LAW THROUGH THE COMITÉ MARITIME INTERNATIONAL

By Sir Leslie Scott, President d'honneur of the Comité, and Mr. Cyril Miller, an Hon. Secretary of the Comité

Commercial law in all jurisdictions has its origin in the custom of merchants. The main link between traders of the Mediterranean and Atlantic seaboards, the Baltic and North Western Europe has from the beginning of the Middle Ages been sea transport, the earliest factor in internationalising law. It is for this reason that the commercial law of these areas in early times tended to become and to remain uniform. The most striking example is perhaps the Rolls of Oléron, which was an established code of maritime law in the early Middle Ages, probably a collection of decisions given by a Commercial Tribunal sitting in Bordeaux. This extensive code of some fifty-six different articles does not differ materially from what is known of the law administered in the contemporary English Court of Admiralty; indeed it was actually written in to the Black Book of the Admiralty in the fourteenth century, and formed part of the maritime law administered in such diverse jurisdictions as medieval Catalonia, Genoa, Flanders, Holland and the Hanseatic cities. Similarly the law of general average spread over the maritime world from its origin in the ancient law of Rhodes and, in early times, maintained a remarkable uniformity; in fact until the Glasgow Resolutions of 1864 the need for international codification of this branch of maritime law does not seem to have been felt. Another factor tending to create and maintain uniformity is to be found in the Bill of Exchange, which was introduced into this country by the Lombards in the early Middle Ages and soon became an essential instrument of international trade between merchants of different countries whose business always requires that their mercantile customs should not be widely divergent. If commercial law had remained mainly declaratory of mercantile custom, it is probable that it would also have remained mainly uniform. However, during the rapid industrial expansion of the late eighteenth and the whole of the nineteenth centuries, two factors operated to create divergence amongst the systems of commercial law

administered in the maritime countries of Europe and later of America as well. One was political; owing to the growth of nationalism, legislation in each country, calculated well or ill-advisedly to foster the particular trade interests of its own nationals, brought about changes in the law which necessarily differed according to the particular needs of each community. The other was historical—the basic divergence between the English system of common law and those systems which derive mainly from Roman law and obtain in nearly all Continental jurisdictions. During the past century or two commercial law has become increasingly preoccupied with the interpretation of commercial documents; and here again the methods and even the principles of interpretation applied by courts administering English law are curiously different from those which are followed and applied in Continental courts. For this reason an important and universal document of international commerce, such as a charterparty or a policy of insurance may receive a widely different interpretation in an English or American court from that which it will receive in a French or Belgian court.

In statute interpretation a comparable difference exists between English and Continental methods of interpretation, the latter admitting evidence of the intention of the Legislature from sources wholly excluded in English courts. Even in the realm of torts, that wide field of law, lying outside both contract and statute law, there had arisen, by the end of the last century, considerable divergences. One illustration will suffice—the action for damages caused by negligence. In our courts of common law a plaintiff guilty of contributory negligence recovered nothing. In Admiralty two ships in collision, both held to blame, had the total damages added together and each got the arbitrarily fixed proportion of one half. On the Continent the proportional rule was applied to all such actions whether on land or sea, each party being held responsible according to the degree of his fault, a much juster and commercially more convenient rule than our old common law rule.

In the result, for these diverse reasons, during the past hundred and fifty years wide and inconvenient divergences of commercial law have become increasingly manifest among the principal trading and maritime countries.

During the last century or half century the political factor has led to substantial divergences of commercial legislation even between Britain and the U.S.A. although the courts of both in theory apply the same basic law.

It was to rectify and check the further increase of this undesirable development that the eminent Belgian advocate, and

subsequently banker and statesman, the late Ministre d'État Louis Franck, in the early nineties of last century conceived the idea of forming an international body whose object should be to achieve and maintain the unification of commercial and maritime law both written and unwritten among the principal maritime countries of the world. From this conception emerged the 'Comité Maritime International', whose first postwar session was held in Antwerp in September last. The Comité first met at Brussels, in 1897, and was composed of the delegates of nine nations; its first consideration was the law of collisions at sea and salvage, on both of which at that time there were important differences in the various maritime jurisdictions. Subsequent diplomatic Conferences dealt with its proposals and the ultimate result in this country was the Maritime Conventions Act, 1911, under which the proportional rule of division of loss as now applied in the Admiralty Court was established, and after thirty-four years extended to our common law by the Act of 1945. Since its first session the Comité has met in various capitals at frequent intervals; perhaps its most successful achievement has been in procuring the unification of the law relating to Carriage of Goods by Sea, which is now embodied in the English Carriage of Goods by Sea Act, 1924, and in parallel legislation in all the British Dominions, the United States of America, and most maritime countries of the Continent; full credit must, however, be given to the International Law Association through whose earlier labours the 'Hague Rules', embodied in the Brussels Convention of 1922, upon which this legislation was founded, were prepared.

The Comité Maritime International has its permanent seat in Antwerp and, in honour of its founder, its President has always been Belgian, its first President being Ministre d'État Beernaert, a former Prime Minister, then Charles Le Jeune, then Louis Franck. Its constituents, however, are national associations established in all the principal maritime countries, who send delegates to each of its sessions. The British constituent is the British Maritime Law Association of which it is customary for the chairman to be one of His Majesty's judges. The character and composition of this association and of the other national associations is predominantly commercial; the legal members are purely advisory, and both the initial choice of the branch of maritime law to be unified and the final resolutions of the Comité giving it shape are matter for the decision of the representatives of the commercial and maritime interests in ship and cargo, such as undertakers, shipowners, average adjusters and bankers, who form the majority of the whole constituents of the Comité's organisation. It is therefore to the

commercial rather than the purely legal implications of the recent session of the Comité that this article is directed.

The method of procedure was as wise as it was original. The objective being national legislation in each country in order to bring into operation the rules of law which the Comité thought the best for universal adoption, it was necessary to divide the work into separate and successive stages : (1) to select a particular branch of maritime law and ascertain by means of reports from the various national associations affiliated to the central body the state of the law on that branch in each country—Collisions at Sea and Salvage were taken together as the first two branches; (2) to discuss those reports at an International Conference of delegates from the national associations and arrive at general agreement upon the best rules to adopt; (3) for the Permanent Bureau at Antwerp to put the agreed rules into the form of a convention and circulate the draft for consideration and report by all the national associations; (4) to discuss those reports at a further International Conference of the Comité; (5) to send the amended and approved draft Convention to the Belgian Government, with a request that it might convene a diplomatic conference at Brussels to consider and pass it as a diplomatic convention with such amendments as the Diplomatic Conference might think fit; (6) the Diplomatic Conference, at which it was the practice of the governments so invited to nominate as their delegates not only their official representatives at the Belgian court, but also two or three leading members of their several national associations; with the result that the Diplomatic Conference started fully informed upon its subject-matter; (7) ratification of the Convention so agreed by the various countries concerned within two years; (8) legislation in each country to give it effect. We emphasise this aspect of method as it is the key to the success of the Comité's work.

During the wars of the eighteenth and nineteenth centuries, international trade, though of course affected, continued even with enemy countries to an extent which we today find difficult to believe; a study of any of the common law reports of the first two decades of the nineteenth century, such as those of East, show how during even the Napoleonic Wars commercial law continued, as in time of peace, to grow with the maintenance of normal trade.

During the recent war (and to a lesser degree during the first world war) the whole activity of the belligerent peoples was concentrated upon the prosecution of the war and normal trade dwindled to insignificance; nevertheless, during both wars a number of legal problems emerged, the solution of which has been and is of both immediate and permanent interest to peace-time

commerce. The rapid development of commercial law in England during the period between the two wars was materially assisted by the judicial solution of problems which either arose from or were brought into prominence by the first world war itself; and of that a striking example is the development of the doctrine of frustration of contract. It is therefore not surprising that the Comité should have set among its first postwar tasks the consideration afresh of two problems whose development was greatly accelerated and importance enhanced by the war itself, the immunity from legal process of State-owned vessels, and the so called 'Gold Clause' which attempts to avert or counteract the effect of fluctuation of rates of exchange between the different currency areas from the payment of claims or damages or from the various limitations of liability which are applied by statute, often as the result of international agreement, to a number of commercial activities.

The immunity of State-owned vessels from legal process is a subject which has in practice given rise to a number of difficult problems in recent years, owing to the great increase in State-owned vessels; it first manifested itself prominently during and after the first world war and was greatly accelerated during the last war; as it is the overt policy of the Soviet Union and all her satellite countries that the nationalisation of commerce should be total, the question to what extent ships in the ownership of a Sovereign State should be free from legal process in the courts of Western European nations is one of immediate concern. In countries whose law derives from that of England the old rule of law that a Sovereign is completely immune from any legal process in any jurisdiction, apart from any concession which he may make in his own courts, has been considerably modified owing to the pressure of public opinion, especially in so far as State trading is concerned. In England the Crown Proceedings Act, 1947, has placed the Crown in the same position as a private individual or corporation as regards legal process in the English courts, with certain minor exceptions considered to be necessary in the public interest. In the United States of America a series of Acts of Congress passed during the last quarter of a century, and culminating in the Federal Law Tort Claims Act, 1946, Public Law No. 601, are designed to the same end. These Acts of Parliament and of Congress affect only the liability of the English Crown and the United States respectively to be sued in their own courts; they do not affect the rights or liabilities of other Sovereign bodies in these courts, nor of British or U.S. rights in the courts of other jurisdictions.

It may be that, in so far as the English and American

jurisdictions are concerned, these two Acts have within our respective countries gone as far as can reasonably be desired to remedy the defects inherent in the old principle of Sovereign immunity. Nevertheless the general and wider question is one of such commercial interest, that it is important to consider the comparative law on the subject and the Conventions already signed though not ratified by some signatories, and not enacted by still more, with the view to recommending supplementary action on such points as may be thought desirable.

Two Conventions have been signed in Brussels; the first and principal Convention of 1926 and a Protocol of 1934 which is explanatory of certain ambiguities in the principal Convention. The scheme of these Conventions is to cast upon 'sea going vessels owned or operated by States, cargoes owned by them, and cargoes and passengers carried on such vessels' and upon the owning or operating States themselves, the same liabilities, enforceable by the same procedure, as are borne by privately owned vessels, cargoes and their owners. It appears, therefore, that under these Conventions (in such jurisdictions as distinguish between actions in rem and in personam):

(a) A State-owned or operated vessel and her cargo (whether also State-owned or not) is liable to arrest in any action in tort or contract in respect of which cause of action the right of arrest of the ship or cargo exists according to the lex fori.

(b) Actions in contract or in tort arising out of contracts of hire or affreightment, collision, salvage, towage, etc., can be brought in personam against the State itself.

'Operation' is defined as including chartering upon time or voyage charter.

The following category of vessels is excluded from the Conventions:—

'Ships of war, State yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State, and *being exclusively used at the time a cause of action arises on governmental or non-commercial service*'.

This Convention makes no attempt to unify the procedural law relating to actions in rem, which is widely divergent in a number of maritime countries, as this task is clearly beyond its scope. Possibly therefore (though we express no opinion), whereas in the English jurisdiction only the vessel herself could be arrested, in Scotland jurisdiction could be founded upon the arrest of any other vessel owned by the same State, and in the United States any other vessel owned by the same State could be arrested, even though the cause of action was one, such as damages

for personal injury, for which no maritime lien exists in English law. Nor does the Convention deal specifically with venue, but presumably the State concerned can be the plaintiff or defendant in *any* court, whether its own or not, having jurisdiction. If it is the defendant in its own court, the Convention in no way interferes with any special procedure required by the lex fori in actions against the State.

This Convention is one of great importance at the present time when so many State-owned vessels are being used for the carriage of commercial cargoes. Further, both the English and American Government schemes for the disposal of government-owned tonnage to private owners include the demise-chartering or sale on hire-purchase of such vessels so that the legal property of vessels operated purely for commercial purposes and by private interests is still left in the State. It is highly undesirable that such vessels should in any jurisdiction be immune from arrest.

These Conventions were signed by nineteen States of which Great Britain (but not the United States) was one, but it has only been ratified (or adhered to) by Belgium, Brazil, Esthonia, Germany, Hungary, Italy (including colonies), Mexico, Netherlands (including colonies), Poland, Portugal (excluding colonies), Rumania and Sweden. Some of these countries have already incorporated these Conventions in their municipal law. The United States did not adhere as their legal advisers considered that the scope of the Convention was adequately covered in their jurisdiction by existing legislation. The Acts of Congress in point are the Suits in Admiralty (Merchant Vessels) Act, 1920 and Suits in Admiralty (Public Vessels) Act, 1925. The history and final nature of this legislation is interesting particularly in that the liability of State-owned vessels to arrest, which was originally imposed by statute, was found to be highly inconvenient in practice and was consequently removed, certain compensatory rights of suit in personam being substituted. As regards vessels owned by or in the possession (by virtue of requisition) of a foreign Sovereign State, whether public or commercial, complete immunity from arrest has been established by a long series of decisions in the Appellate and Supreme Courts of the United States.

English law on this topic used to be considered as settled in the same manner by decisions of the courts given chiefly during and immediately after the first world war. Since the decision of the House of Lords in *The Cristina*, [1938] A.C. 485, however, the principle that a vessel owned by a Sovereign State but engaged solely in commerce, is immune from arrest in English law whatever the cause of action, is not unqualified. Lord Wright

considering the Conventions under discussion expressed the view (at p. 513) that they might not have the effect of permitting the arrest of a State-owned vessel in an action for possession.

In France and Belgium only a limited immunity is granted, and in Italy no immunity at all. Soviet Russia has never claimed in the English courts immunity in respect of her State-owned merchant fleet. (One member of the House of Lords, Lord Maugham, at p. 523 of the above-mentioned case, doubted whether she could do so in English law.)

At Antwerp last September the Comité, in the light of recent experience, found a number of points for criticism in the 1926 and 1934 Conventions; nevertheless, it felt that the matter was one of such importance for the future that it resolved unanimously to request the Belgian Government to convene the necessary Diplomatic Conference to put these Conventions into effect, with or without amendment.

The second question of major importance which was examined in detail by the Comité was one which arose out of the first world war and has been accentuated by the second; it is that of equiparating the payment of claims and damages and the various standards of limitation of liability, established by the municipal laws of the principal maritime countries, so that the same relative value may be recovered in whatever jurisdiction such claims, damages or limitations fall to be assessed.

The violent fluctuations of rates of exchange of national currencies and of the consequent measures of currency control adopted by most of the governments of the principal maritime and commercial countries of the world during the past quarter of a century, have engendered numerous attempts, by or on behalf of those engaged in international trade, to devise some standard whereby the inequalities inherent in these developments can be avoided. The Comité dealt principally with this problem as it affects one particular and very important international industry, the shipping industry, but its impingement upon other international industries, such as banking and insurance, could not, even upon a consideration of the shipowners' problem alone, be ignored. The problem is primarily one of economics, but the solution, if there be at this stage a satisfactory solution, must, to achieve any practical result, ultimately be expressed in the legal form of municipal legislation by the countries concerned.

Since the abandonment by a number of the principal maritime and commercial countries of the metal gold as the basis of their currencies, the municipal courts of these countries have had to apply the effect of this economic policy to contracts, made between

private individuals or corporations, containing the so-called 'Gold Clause'—a provision intended to avert from the performance of the contract the unpredictable effects of fluctuations in national rates of exchange. Two main problems emerge. Perhaps unfortunately the courts (at any rate of Great Britain and the United States) have only had to deal with one. These problems are :—

1. Whether by amendment of municipal laws consequent upon international agreement, the payment of claims arising out of international commerce, such as shipping, can be equiparated to some common standard in whatever jurisdiction the claim may be determined and in whatever currency it may be paid.

2. Whether by the same process the various limitations of liability many of which are the result of international Convention can be so defined in the municipal laws of the countries concerned that the sum stated by each Legislature (or produced by the formula laid down by each Legislature) shall bear the same real financial value in whatever jurisdiction the limitation is decreed, or in whatever currency the claim so limited falls to be paid.

1. The first problem may be stated in terms of a claim arising in the shipping industry as follows :—

A Swedish ship is in collision with a French vessel and the claim is pursued (as often happens in such cases) in the English Admiralty Court, which finds the Swedish vessel solely to blame. The claim of the French owners will be composed, in its essential items, of the cost of repair, damages for the loss of use of the ship during the period in which she was idle owing to the collision, and the aggregate of sundry expenses such as crew's wages, port charges and agency fees incurred during that period. A further complication frequently arises from the fact that only temporary repairs are practicable at the time and permanent repairs are deferred, in which case the French owners are entitled to an allowance for the depreciation in value of the ship measured by a forecast and estimate of the future cost of permanent repairs. These items will probably be stated initially in a number of different currencies in which that of the country in which the ship is repaired (which in practice may well not be either Great Britain, Sweden or France) will usually predominate. The English court has, however, to convert the whole claim item by item into sterling at the appropriate rate in order to give its final judgment, as, under English procedure, the court can only give judgment in sterling (upon the ground that that is the only currency in which it can, if necessary, enforce payment). The Swedish owners have then to provide sterling in England to satisfy the judgment. The French owners are, however, primarily interested only in French francs, although

they may also require sterling credits for the disbursement of their vessels within the sterling area. The sum in francs which the French owners will ultimately recover will however differ from that which they would have received if precisely the same claim had been adjudicated in say the Dutch, Belgian or French Court, for three main reasons :—

(a) Foreign Exchange Control which differs in its operation in the various countries according to their current economic situation;

(b) the fact that nearly all official rates of exchange are artificial, so that a sum in Swedish kroner, for example, will produce a different amount in French francs, if the conversion is made *via* sterling, from the amount which would be produced if the francs were purchased direct;

(c) the English (and it is believed the American) courts consider that the appropriate rate of exchange in order to convert a foreign currency into sterling (or dollars) is the rate current at the date, when on each item of claim there accrued to the plaintiff the right and to the defendant the duty of payment. In the above example, the French owners would be awarded a sum in sterling equivalent to the cost of repairs, say in Holland, at the rate of exchange between sterling and guilders current at the date when the repair account (in guilders) was actually paid : the same principle would be applied to all the other items of the claim which were initially expressed in a currency other than sterling.

Most Continental systems of jurisprudence prefer to apply the rate of exchange current at the date on which final judgment is given, or even the date on which actual payment of the claim is effected. Under these systems the French owners would, if they had effected the repair of their ship in Holland, receive under the judgment such sum in sterling as would, at the date of judgment or payment, purchase the precise amount of guilders which they had paid the repairers.

It would seem that no municipal legislation by international agreement can avert the first difficulty, *viz.*, Foreign Exchange control. Currency control is, for good or ill, an essential factor in the defence of a nation's economic system under present conditions, and is long likely to remain so. Its operation cannot probably be regulated within closer limits than those agreed at the United Nations Monetary and Financial Conference at Bretton Woods in July, 1944, and these limits are far too wide to afford a solution for the difficulty under review. In the example given above the French owners might not be permitted by the British Foreign Exchange Control to convert the whole or even part of the sterling

sum recovered from the Swedish owners into francs, if at the time French francs were a 'hard' currency to Great Britain.

It does not appear possible, at any rate in the foreseeable future, to regulate by international agreement the exercise of such discretion by each national Currency Control. The obligation of the British Government to ensure the 'convertibility' of sterling from July 15, 1947, proved unworkable within a month and reversion to strict control was found to be essential to preserve the currency from collapse.

The second difficulty—the artificiality of official rates of exchange—may be ultimately solved by the operation of the International Monetary Fund established under Bretton Woods, by which it is intended that the relative values of the currencies of each of the Signatory States shall be fixed from time to time at a parity which as nearly as possible represents the real commercial balance of the country concerned. These parities will be of universal application to all commercial and financial transactions. A view was, however, strongly expressed in some quarters at the Antwerp Conference that it was for the time being premature to regard the future of the Bretton Woods organisation as sufficiently established to justify so far reaching a step as present reliance on the International Monetary Fund as the solution of this very difficult problem.

The third factor (the difference of date for exchange in different judicial systems) gives rise to the question whether the English rule (which was established by judicial decision and not by Act of Parliament) does not on balance operate too harshly upon a claimant, and should not be revised to accord with the Continental rule.

Apart from the consideration of the appropriate rates of exchange, the English and American courts appear to have had to consider this problem only in relation to the 'Gold Clause' which used frequently to be inserted in debentures or other securities issued by corporations whose shareholding is international.

After Great Britain came off the Gold Standard (which she did finally in 1931), the question of the construction of bonds issued in September, 1928, by a Belgian corporation came before the House of Lords for determination in 1934. The bonds provided for payment of principal and interest of certain sums expressed as '£x in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928'. At the time of the decision the only legal tender in Great Britain for sums of the size in question was Treasury or bank notes, and a contract to effect payment in gold would have been illegal. The

court, however, upheld the Gold Clause by deciding that it should be construed as an obligation to pay, on the due dates, such a sum in sterling as represented the gold value of the nominal amount of each payment, such gold value to be ascertained in accordance with the standard of weight and fineness existing on September 1, 1928. The £ sterling was at that date worth 123.27447 grains of gold of millesimal fineness 916.66 : the effect of this decision was, therefore, that the corporation had to pay for every unit of £1 stated in the bonds such a sum in sterling currency as would at the date of payment purchase 123.27447 grains of gold of the stated fineness : this sum would of course exceed £1 in the then sterling currency. Such payment was held not to be illegal as it was not payment physically in gold.[1] The United States Supreme Court, faced with a similar problem in the same year (1934), placed the same construction upon the Gold Clause as did the English Court; namely, that the clause did not provide for payment in gold as bullion, but for the payment of money in legal currency in an amount measured by reference to a standard of gold. But the Supreme Court held that the clause was invalid as being contrary to a joint resolution of Congress of June 5, 1933, which resolution was held to be within the powers of Congress under the Constitution.[2] The same interpretation was put upon the Gold Clause by the Permanent Court of International Justice in 1929,[3] but no question of illegality or public policy arose in these cases. We were informed that the Supreme Court of the Netherlands refused to recognise the joint resolution of Congress above referred to as a statement of public policy to which a Dutch Court could subscribe. In 1937, however, the Netherlands Parliament enacted that such clauses as the Gold Clause were invalid, if contained in contracts entered into before September 27, 1936, in so far as the gold value provided in the clause was higher than Dutch guilders 1653.44 to one kilo of gold. In contracts entered into subsequently to September 27, 1936, the Gold Clause is valid subject to the condition that it does not provide for payment in gold as bullion. The date of September 27, 1936, was chosen because on September 26 the Dutch guilder was devalued. The view of the Netherlands Parliament seems therefore to have been that legislation was required to protect those who were adversely affected by the devaluation by reason of having entered into contracts to pay sums based on a standard of gold prior to the devaluation, but that, if

1 *Feist* v. *Société Intercommunale Belge d'Electricité*, [1934] A.C. p. 161.
2 *Norman* v. *Baltimore and Ohio Railroad Co.*, 294 U.S. 240.
3 *Cases of Serbian and Brazilian Loans*: see Lauterpacht's *Annual Digest of International Law*, 1929–30, p. 466.

persons chose to bind themselves by a Gold Clause with full knowledge of the possible fluctuation of currency values and its effect, there was no ground of public policy for holding such a contract to be illegal. The Belgian Court, we were told, have taken the same view. A French legal opinion was expressed at Antwerp that under the French jurisprudence, however, the Gold Clause, even construed as a contract to pay money based on a standard of gold and not gold itself, would be contrary to public policy : in this connection, however, it is to be pointed out that France was a signatory to, and has ratified, the Warsaw Convention, under which the liability of an air carrier is limited in certain circumstances to the sum of French francs 125,000, the franc being the gold franc containing 65½ milligrams of gold of 900 millesimal fineness.

It appears, therefore, that no doubt about the true meaning of the Gold Clause is today entertained in the courts of any country, but that considerable difference of opinion upon its legality or accordance with public policy has arisen.

2. *Limitation of liability.*—The second main problem was the one with which the Comité was the more instantly concerned, and, upon its true analysis, is quite a different problem from the first. In all the principal maritime and commercial countries the policy of the law (whether by statute or judicial decision) has been to encourage maritime trade by limiting the liability of the party who has the highest stake in a marine adventure, namely, the shipowner. It is unnecessary to consider here in detail the methods which have been adopted by the various systems of jurisprudence; it is sufficient to state that these methods differ both in the scope of the limitation permitted and in the amount at which it is fixed, differences which are due to divergences in the development of this principle in the various countries over the past two centuries. There are, however, three main methods :—

(a) The liability is limited to the actual value of the ship concerned and her freight at the time of the claim. This is the ancient method adopted by the Latin European countries and later by the U.S.A..

(b) The liability is limited to a sum calculated upon a formula of which the basic constant factor is the tonnage of the ship. In Great Britain a shipowner may limit his liability for damage to any other vessel or goods on board of her or to property of any kind on land or water to a sum equivalent to £8 per ton of the gross registered tonnage of the ship : if there is loss of life or personal injury in addition to damage to property the limit is raised to £15 per ton. This is the result of an enactment in the middle of the nineteenth century when the £15 per ton was arrived at by dividing

the aggregate tonnage of the then British Mercantile Marine by its then aggregate value. The figure is of course wholly out of step with the present value of tonnage. Holland applies a similar but more complex and probably more scientific formula based on tonnage.

(c) With regard to loss of or damage to the cargo carried in his own vessel the shipowner may, in certain circumstances, limit his liability to a certain fixed sum per package or unit of cargo. This is the result of municipal laws passed during the last twenty-five years by the principal maritime countries in accordance with the Brussels Convention of 1922 already mentioned. It is important, however, for the present purpose to note precisely how the various countries concerned have drafted their enactments to this end.

Great Britain and Australia have imposed a limit of £100 per package, but both have also laid down in their Municipal Act that this monetary unit shall 'be taken to be of Gold Value'. The precise effect of this has not yet been decided by the courts, and has led to considerable dispute in practice. The United States and Canada have fixed the limit at $500 per package, but have each defined this sum as 'lawful money of the United States' ('or Canada' as the case may be). The other European maritime countries have each fixed the limit in its own currency, and in some countries but not all, the limit has been defined as of 'gold value'.

The problem which arises under all these systems of limitation is that, owing to the fact that nearly all current official rates of exchange are artificial, and do not represent the real trade balances of the countries to which they apply, there is no equilibrium between the limits sanctioned in the various jurisdictions as there clearly should be.

To adapt the example given above to a claim by a French cargo owner for loss of or damage to his cargo carried in a Swedish ship, if the claim is brought in the English Court and exceeds £100 per package, it may be that the French cargo owner will only recover £100 of current British money for each package lost (though the point has not yet been decided); if, however, the claim is adjudicated in the American Court his recovery will be U.S.$500 of U.S. current money per package. But, again, the French cargo owner is ultimately interested in French francs, and in the former case he will recover 48,000 francs and in the latter 60,000 francs per package at present rates of exchange.

At the recent session of the Comité the French and Belgian delegates presented powerful arguments in favour of expressing the limitation in terms of gold of a stated fineness. The British view was that this proposal would achieve the desired object if, but only

if, gold is and is likely to remain an international standard of currency. Unfortunately it is clear that this is not so, because not only is the sale and purchase of gold restricted and regulated in nearly all countries, but its price is fixed at official rates which have little relation to its true commercial value. One illustration will suffice. The official price at which the United States Treasury is prepared to purchase gold is $35 per ounce, which is the pre-war price, although the price of all other commodities has substantially risen owing to the post-war conditions. The United States does not, however, sell gold (which it normally provides only to the Central Banks) at this price. Further in India and Egypt, which countries have now linked their currencies to the dollar, and in which there is a relatively free market in gold, the price of gold is $60 to $90 per ounce. In countries in which the purchase and sale of gold is restricted, there is always a ' black market ' of some kind in which in every case the price is higher than the U.S. official price. It is obvious therefore that any attempt to secure equilibrium in limitation of liability by reference to the value of a gold unit must fail.

There does at first sight appear to be another solution. The object of the International Monetary Fund is to re-establish a system of exchange which shall be free of restriction and control and shall ensure that each and every national currency and gold shall be convertible, the one into any other at rates which truly represent the economic balances of the various countries. The fund has had, it is true, to accept initially a conventional parity declared by the Government of each member State, *viz.*, the present, in most cases artificial, parity, and all currencies are linked to gold at the U.S. official price. Nevertheless the whole intent is that as soon as possible the parities shall be adjusted to achieve the object above mentioned.

It would appear, therefore, that the only standard which can be adopted for the purpose of equiparating limits of liability is that which it is hoped will ultimately be achieved by the International Monetary Fund. It is difficult to devise a method of effecting this other than by municipal legislation in each country in which the various limits agreed upon are stated in one currency. This would mean in practice that, whether the municipal legislation was American, Belgian, British, Dutch, French, or that of any other State, the limits of liability would always be stated in, say, sterling. Then, for the purpose of converting the agreed sterling limit into currency of the country in whose courts limitation was being decreed, the current rate of exchange between sterling and that particular currency fixed by the International Monetary Fund

would be applied. The main difficulty in obtaining international agreement to this solution would probably be found in the choice of the standard currency; theoretically if the fund fully achieves its object it is immaterial which currency is chosen, but for practical and prestige reasons the choice may prove to be one of importance and difficulty.

However, upon consideration of the present uncertain conditions of world economy, it was reluctantly decided at Antwerp that it would be most imprudent to attempt to anchor the payment of commercial claims between nationals of different currency areas to a new and untried adventure such as the fund. If this were done and the fixing by the fund of the various parities should prove a failure, a highly dangerous situation would arise which could only be met by the immediate alteration of a large number of municipal statutes. The Comité was therefore left with the conviction that there is, under present economic conditions, no safe solution of this problem; although at the same time it was strongly felt and the view was expressed that 'gold clauses' in legislation relating to commercial matters were a source of great danger for the future and therefore should be repealed. It was decided, however, that the matter was one of such commercial importance, that it ought not to be delayed; and accordingly that a representative sub-committee should be appointed to consider the question forthwith and to report to the Comité whether a practicable solution of this problem, ensuring a safe and reasonable measure of international stability can be found.

The Comité also considered several other questions, the limitation of liability of shipowners particularly for the cost of removal of wrecks from waters under the jurisdiction of dock and harbour authorities, the revision of Rule XXII of the York/Antwerp Rules, 1924, relating to interest on general average disbursements, and air/sea rescue. Upon the first two matters satisfactory conclusions were reached; the last point was felt to be one which could only be considered after fuller technical information was available.

The Conference was essentially a meeting of business men directly concerned in maritime commerce and got through a heavy agenda with real understanding and expedition. The work of the Comité was greatly aided by the skilful and firm but tactful handling of M. Lilar, ex Minister of Justice, who in accordance with tradition, became President of the Comité and of the Conference.

THE INTERNATIONAL TECHNICAL COMMITTEE OF EXPERTS IN AIR LAW

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The International Technical Committee of Experts in Air Law, commonly known (from the initials of its French title) as CITEJA, was established as a result of an international conference on private air law held in Paris in 1925 and has been effective (apart from the war years) since 1926.

At the plenary meeting held in Montreal in May, 1947, it was resolved that, in view of the fact that the Chicago Convention on Civil Aviation of 1944 had received sufficient ratifications to bring it into force, and with it to bring the permanent International Civil Aviation Organisation into being, and in view of the forthcoming establishment of a Permanent Legal Committee by that organisation, CITEJA should be dissolved and its functions transferred to the Organisation. This therefore seems an appropriate time to review the work of the Committee during the twenty years of its existence and to forecast the tasks which will have to be carried on by its successor.

1. COMPOSITION AND ORGANISATION

The first impulse towards the establishment of a Committee concerned with the study of private air law, came from the League of Nations Transit Commission, which, in 1922, drew the attention of member governments to the importance of unification in this field. This was followed by action on the part of the French Government, which, in 1923, called an international conference on private air law. The tasks of this conference were to be to draft a convention on the liability of carriers by air, and generally to study the possibility of a unification of private air law. Results were obtained under both headings. The proposed Convention materialised in due course in the Warsaw Convention (see below) : the study of the unification of private air law became the task of CITEJA.

The report of the first Commission of the Paris Conference, which led to the establishment of the Committee, is not without interest. The Commission was faced at the outset of its work with the question of method. Two alternatives were suggested :

first, to draw up—on an a priori basis—a table of contents for a possible code of international air law,[1] and second, to examine the various national laws on the subject, note the concordances, discordances and lacunæ appearing, and then see how the discordances might be resolved, the lacunæ filled up, and the concordances made use of as the foundation of a unified code.

The method adopted was the second. Upon examination of the existing national laws, it immediately appeared that the Italian law (of 1923) was by far the most comprehensive. The proposal was therefore made to take this as a basis of study for a logically developed plan of legislation covering the usual fields of law of property, obligations, liability, etc., and to examine each topic simultaneously with the others, with a view to achieving a complete international code. After some discussion, this proposal was not accepted. It was decided instead to proceed to study each subject according to its practical relevance for aviation, without regard to considerations of theory, and it is on this basis that CITEJA has worked. Experience has certainly vindicated the wisdom of the decision then taken.

CITEJA was, then, established in 1926. It was composed of independent experts nominated by governments on the basis of legal capacity.[2] Thirty-four governments have from time to time participated in its work.

2. REVIEW OF THE COMMITTEE'S WORK

Convention for the Unification of Certain Rules Relating to Carriage by Air (Warsaw Convention)

The circumstances in which the study of this Convention was commenced, have been described above. Its final completion and adoption at the second international conference on private air law held at Warsaw in 1929, represents the Committee's principal achievement. The Convention has been ratified or adhered to by thirty-four States including the United Kingdom, U.S.A., U.S.S.R., France, Germany, Italy, Holland and Egypt. In addition, each of these countries has adopted the Convention in respect of its colonies, protectorates, etc., thus giving a world wide scope to its application. The Convention has passed into English Statutory Law through the Carriage by Air Act, 1932, to which it appears as a schedule,[3] and has been applied, by colonial enactments, throughout

[1] An attempt to do this had previously been made at the International Conference on Air Navigation in 1910.

[2] The United Kingdom representatives have been: Sir Alfred Dennis, Sir Maurice Amos, Sir Alfred Brown, Major K. M. Beaumont and Mr. R. O. Wilberforce.

[3] It may be noted that, since the official language of CITEJA was French, the Convention was adopted with a French text only. The English translation

the British Empire[4] and the Colonies of France, Belgium, Spain and the Netherlands. Further it may be noted that although the Convention itself in terms applies only to 'international carriage', section 4 of the Carriage by Air Act, enables it to be applied, by Order in Council, to carriage which is not 'international carriage'. It has, in fact, already been received into the domestic law of Belgium, Greece, Holland and Italy. It may, therefore, fairly be claimed that the Warsaw Convention has gained very general acceptance. Certain provisions of the Convention, which are of general interest, may be briefly examined:—

In Articles 17–30 the Convention establishes a basis of the liability of a carrier by air in respect of passengers, baggage and cargo (Articles 17–30). It was naturally this part of the Convention which provided the liveliest discussions in the drafting stage. In 1928–9 there was little general experience of the risks of carriage by air; the profit margins of operators were uncertain, insurance rates were not firmly established. On the one hand there was the danger of exposing a nascent industry to crippling claims; on the other there was a clear necessity to provide intending air passengers with a measure of assured compensation.

As a matter of jurisprudence, there were those who considered that the correct basic principle to apply was one of absolute liability (risque)—mitigated perhaps by certain express exemptions (as for concealed defects): others thought that liability should be founded upon a theory of negligence (faute)—fortified as necessary by the additions of presumptions ('res ipsa loquitur'), or by suitable distribution of the onus of proof. The theory which emerged was, inevitably a compromise.[5] On the whole the theory of negligence prevailed, with a number of modifications designed to meet practical requirements.

In the case of death or injury caused to passengers, the carrier is declared prima facie liable. He is, however, given the opportunity of escaping liability if he proves that he and his agents have taken all necessary measures to avoid the damage. (Presumably this means 'all reasonable measures', since, if a 'necessary'

which has been used in the Schedule to the Carriage by Air Act, 1932, has, therefore, no international authority. A different 'English' translation is in force in the U.S.A. (U.S. Treaty Series No. 876).

[4] Shawcross and Beaumont, *Air Law* (1945), para. 1751.

[5] It is interesting to note that this Convention came under discussion at the same time as the French courts were critically examining the doctrine of 'faute' in relation to CC 1384. The adoption of the 'faute' basis in the Convention came, in fact, between the two famous decisions of the Cour de Cassation of February 21, 1927, and (of the Chambres Réunies) of February 13, 1930, which swung the pendulum towards the doctrine of 'risque créé'.

measure had been taken, the damage would not have occurred[6]: that this is so, has been recognised by the Committee in considering a revision of the Convention—see below.) The doctrine of contributory negligence is introduced (Article 21)—the 'Admiralty rule' as to contribution being applied. Finally, the carrier's liability is limited to 125,000 francs[7] in respect of each passenger, unless a higher limit is mutually agreed. What does this amount to? In effect the carrier is liable on a basis of negligence: since, however, the passenger is seldom in a position to prove negligence—a great part of air accidents being fatal to all concerned—negligence is presumed, unless the carrier can prove the contrary: as a quid pro quo for this shift in the onus of proof, the carrier has his liability limited to a manageable sum.

One other factor of importance must be noticed: the limit of liability does not apply 'if the damage is caused by "wilful misconduct"' (*dol*), either on the part of the carrier himself, or of any agent[8] acting within the scope of his employment. This in practice, imposes a powerful deterrent upon carriers seeking to escape their prima facie liability: the risk is, in fact, a formidable one that an attempt to prove that 'all necessary (reasonable) measures have been taken' may lead to it being established that the case is one of 'wilful misconduct', involving unlimited liability. As a rule, therefore, it has been found that carriers—and their insurers—accept their liability for damages up to the limited sum.

Similar provisions, with different monetary limits, apply to carriage of baggage[9] and of goods. One exception is added, however (Art. 20 (2)), namely, that the carrier escapes liability if he can show that the damage was caused by negligent pilotage. The records of the discussions at Warsaw reveal that this exception was the result of a compromise: proposed, in the first instance, to apply to all cases, it was finally accepted, as an adaptation of maritime law,[10] in relation to baggage and goods, but not to passengers. It seems to have little usefulness in practice, since here again there is the risk of the case turning out to be one of 'wilful misconduct'.

[6] The Convention was in fact applied in this sense by the Italian Court of Cassation in the case of *Soc. di Nav. Aerea* v. *Palleroni*, March 31, 1938. See also *Grein* v. *Imperial Airways*, [1937] 1 K.B. 50 (C.A.).

[7] Fixed according to a defined 'gold standard' parity. The present sterling equivalent is about £2,000.

[8] This includes 'servant': Air Navigation Act, 1936, s. 29.

[9] Present limits are (approximately), £4 per kilogram for registered baggage or cargo and £80 per kilogram for luggage retained by the passenger.

[10] Bills of Lading Convention signed at Brussels in 1924, Art. 4 (Cmd. 3806–1931).

Revision of the Convention

With the increase in air traffic, it soon became apparent that the Convention required re-examination. The initiative came from two commercial bodies, the International Air Traffic Association (IATA) [11] and the International Chamber of Commerce.

As rapporteur for the CITEJA, Sir Maurice Amos was engaged in preparing the way for a revision of the Convention, but did not live to present the results of his research. His work was resumed at the first post-war session of CITEJA in January, 1946, with Major K. M. Beaumont—British representative—succeeding as rapporteur to Sir Maurice Amos, and has been continued at subsequent sessions by IATA and by PICAO.

Some of the points raised may be briefly indicated :

(1) *Applicability of the Convention.* The present version applies to 'international carriage' which is defined as carriage between the territories of two parties to the Convention (*e.g.*, from U.K. to U.S.A.) or within the territory of one party, if there is an agreed stopping place within the territory of another State, whether a party or not, *e.g.*, from U.K. to Singapore with an agreed stop in Iraq or Egypt.

Applicability, in other words, is governed by the nature of the journey irrespective of the nationality of the aircraft.

It has been agreed that this is unsound in theory and in practice : in theory because it may tend to impose an unacceptable and possibly also an unenforceable basis of liability upon aircraft of non-party States; in practice, because it is inconvenient for a national airline to be subject to bases of liability which may vary according to the particular trip being undertaken.[12]

On the other hand, to base the applicability of the Convention solely upon the nationality of the aircraft irrespective of the place of departure or destination, or the 'lex loci contractus' (or, which may be the same thing, upon the proper law of the contract), would raise difficulties of jurisdiction, and also practical difficulties since aircraft of different nationality flying the same route might be operating upon a different liability basis. The question is one for further discussion in the light of principles of private international law : possibly a combination of the two criteria may prove to be the solution.

(2) *Basis of liability.* Apart from some subsidiary points, for example the elimination of the exception of negligent pilotage, it

[11] Predecessor of the present IATA (International Air Transport Association).

[12] A remarkable anomaly arises in the case of return trips: a passenger taking a return ticket from New York to Lisbon is within the Convention, while one taking a return ticket from Lisbon to New York is not.

has not been suggested, so far, that the general basis of liability should be altered. It has generally been felt that any proposal for a change would be too controversial to lead to a clean solution, and that the result would again be a compromise, possibly less satisfactory than the present. The question is, however, open whether the limits of liability might be changed. On the one hand, with the fall in the value of money, the maxima are now appearing inadequate as compensation compared with the sums being awarded in the courts : on the other hand, the construction of larger aircraft [13] carrying more passengers and bigger loads, is tending to make the overall cost of an accident greater than can be borne by all but the largest companies. It is possible that the limits will remain unchanged.[14]

(3) *Traffic Documents.* The feeling has generally been expressed that the Articles of the Convention which prescribe the particulars to be inserted in traffic documents, require revision in the light of experience, and that in any event, amendment is required of the penal provisions by which a carrier, who fails to deliver documents of the type prescribed, loses all right to avail himself of those provisions of the Convention which exclude or limit his liability. A further question has been raised by the United Kingdom delegation —which is one of the general technique of international legal drafting—whether it is sound to deal in a Convention with matters of administrative detail, which require modification from time to time, or whether such matters should not be dealt with administratively (*e.g.*, through ICAO).

(4) A number of other matters require to have fresh provision made for them : some definition must be made of the liability of charterers of aircraft; the right of stoppage in transitu needs clarification, and provision must be inserted which will enable imperial powers to secure the benefits of the Convention for flights between their various overseas possessions.

The above sufficiently indicates the wide scope of the problems of private international law requiring regulation in this field, and their general interest both to students and practitioners.

Damage Caused by Aircraft to Third Parties on the Surface (Rome Convention)

This subject has been regulated by the Rome Convention prepared by CITEJA and adopted at the Third International Conference on

[13] The cost of a fatal accident to the proposed Bristol Brabazon, which may carry up to 200 passengers, might amount to £500,000, under the Convention alone.
[14] The American Bar Association resolved in September 1947 that ICAO be urged to consider an increase in the limit of passenger liability.

Private Air Law in 1933. This Convention although signed by nineteen countries (including the United Kingdom) has only been ratified by five (not by the United Kingdom). The rapporteur was Professor Ambrosini (Italy) assisted by M. Vivent (France). The Convention establishes the principle of absolute liability, subject to mitigation only on proof of contributory negligence (a most unlikely event).[15] Liability is placed on the operator of the aircraft, defined as the person who has the aircraft at his disposal, and who makes use of it for his own account, (an unsatisfactory definition since it would apparently render liable the charterer of a fully equipped aircraft with crew). A limit[16] of liability is established, based upon weight of the aircraft, with an overall maximum of 2,000,000 francs,[17] one third of this maximum being appropriated for damage to property and the rest to persons. The limits are, however, removed, if the operator, his servants or agents are guilty of gross negligence (faute lourde) or wilful misconduct (dol) unless the operator can prove that the damage resulted from negligent pilotage or, where his servants or agents are concerned, that he has taken all proper steps to prevent the damage.

The limits are equally removed, if the operator does not comply with the provisions of the Convention which require insurance or guarantee to be effected in respect of damage arising under the Convention.

These provisions need not be here described in detail: it is, however, interesting to refer to the manner in which CITEJA dealt with one particular difficulty. It was appreciated in 1933 that in order to give the injured third party real protection, it was not enough merely to compel the operator to obtain insurance cover, since the policy might—and normally would—contain a number of 'escape clauses' which, however proper and necessary as between the insurance company and the operator assured, would cause hardship if invoked against the third party. It was not possible to obtain agreement on this subject before the signature of the Convention, but study was subsequently continued with the collaboration of the International Union of Aviation Insurers and resulted in 1938 in agreement acceptable to the Union. This was embodied in a Protocol to the Convention, which was signed in Brussels in 1938: briefly, this Protocol limited the escape clauses in an

[15] The Air Navigation Act, 1920, s. 9, relieves the aircraft of all liability in cases where the plaintiff has been guilty of any degree of negligence.

[16] The principle of limiting the liability of operators in this case (as against entirely innocent third parties who cannot be said to have voluntarily engaged themselves in the risks of aviation) was described by M. Pittard (Switzerland) as 'a legal monstrosity'.

[17] Present sterling equivalent £22,000 approx.

insurance policy, which can be employed against a third party suing under the Convention, to three main headings carefully defined. The production of this Protocol can be considered a sound piece of practical work : apart from this aspect, however, the complication of the liability provisions of the Convention and their relation to exclusive conceptions of Continental law (a feature which, indeed, characterises the Convention as a whole) militate against its wider adoption. However, in Part III of the Air Navigation Act, 1936 (which is not yet in force) after reciting (Section 21) that 'it is expedient that provision should be made for giving effect to the said Convention' power is taken to bring it into force by Order in Council.[18]

A suggestion for the revision of this Convention has now been made and the matter stands upon the agenda of the Legal Committee of ICAO.[19]

Convention on Assistance to and Salvage of Aircraft at Sea

A Convention 'for the unification of rules' on this subject was prepared by CITEJA and was signed at Brussels in 1938 by a number of States including the United Kingdom. It has not yet received a sufficient number of ratifications to bring it into force. The Convention pursues two main objectives: first, to establish and define the mutual obligation of ships and aircraft to assist each other in case of peril at sea : and secondly, to lay down rules regarding the compensation and remuneration due to those rendering services of salvage and assistance to aircraft.

Under the first heading, an obligation is created for ships and aircraft to render mutual assistance in all cases of danger to human life at sea whenever this can be done without serious risk to the ship (or aircraft), its passengers or crew. No similar obligation exists in the case of danger to cargo, but of course, in the majority of cases danger to cargo is inseparably involved with danger to human life. In all cases where assistance is rendered under the obligation to do so, those concerned are entitled to compensation in respect of their reasonable expenses (including the cost of fuel, wear and damage to equipment, etc.) but only up to a limit of 50,000 francs for each person saved with a total of 500,000 for the whole operation.[20] Thus, in this Convention, we trace once

[18] It is understood that the obstacle to the U.K. ratification was the discrepancy between the Convention limits of liability and those fixed by the Air Navigation Act, 1936.

[19] Since the above was written the Legal Committee has referred study of this Convention, with a view to revision, to a sub-committee of which the writer is a member.

[20] These are again gold francs: present sterling equivalents are approximately £800 and £8,000 respectively.

again the anxiety of the international legislator to limit the liability of aircraft operators. In cases where the assistance is given gratuitously, *i.e.*, without any legal obligation, compensation is only payable if the assistance in fact contributes to the rescue of the persons endangered.

Under the second heading, the Convention states the bases upon which remuneration is payable in respect of salvage operations when these are carried out. These rest (analogously to maritime law) first upon the success gained, the efforts of the salvors, the risk incurred in the operation, the time spent and the charges incurred, and secondly upon the value of the goods salved. The distribution of the salvage money between the operator and the crew is left for regulation by national laws. Liability for payment of salvage money is placed upon the operator (defined as the person having control of the aircraft and using it for his own account) subject to the right on his part to recover proportionately against the owners of goods salved, unless the salvage was rendered necessary by conduct on his part which would result in liability towards those owners (*e.g.*, under the Warsaw Convention).

Finally there is a provision that no compensation or remuneration is due when services of assistance or salvage have been rendered in the face of explicit *and reasonable* refusal on the part of the person assisted or salved.

No proposal to revise this convention has yet been brought forward. But revision may be necessitated by the progress of technical work within ICAO (see next paragraph).

Draft Convention on Assistance and Salvage of Aircraft on Land

This subject was initially considered by CITEJA together with the parallel subject of assistance and salvage at sea. It was, however, decided in 1935, that these two related questions should be separately pursued: the decisions reached on assistance and salvage at sea have already been described.

A draft Convention on assistance and salvage on land was presented by the rapporteur, M. Vivent, in 1939. This was based upon the principle of obligatory assistance subject to similar conditions to those applicable at sea, but with this difference, that the obligation only arises if the aircraft in distress is situated in certain 'danger zones'. These 'danger zones' are defined as 'zones known to be devoid of all normal means of assistance and relief': their limits are to be fixed by the States within whose boundaries they are. In addition to the provisions relating to assistance, the draft Convention contained a number of rules applicable to salvage

of aircraft on land similar to those contained in the Convention on salvage at sea.

After the war, at its meeting in Paris in January, 1946, CITEJA adopted a draft Convention on assistance and salvage of aircraft on land, on the above lines and transmitted this draft to the Provisional International Civil Aviation Organisation, the intention being that the subject should be further studied together with the relevant provisions of the Chicago Convention of 1944 on Civil Aviation. That Convention, as well as imposing (Article 25) upon contracting States a general obligation to assist aircraft in distress in their territories, also contained, in technical annexes, detailed provisions on assistance to and search for aircraft in distress, mentioning in particular the case of aircraft in distress in uninhabited areas. These technical annexes, which were adopted in provisional form only at Chicago, are still under study by ICAO, the permanent successor to PICAO. It remains to be seen whether the subject of assistance and salvage on land (and indeed, also at sea) will be dealt with by means of independent Conventions, or whether it will be regulated by a technical annex to the Chicago Convention.

Convention on Precautionary Attachment of Aircraft

A draft Convention on this subject was proposed in 1931 by Dr. Riese (Germany) and was adopted and signed at the Third International Conference on Private Air Law at Rome in 1933. It has since been ratified by twelve States not including the United Kingdom, U.S.A., or France. The purpose of the Convention is to prevent the immobilisation of aircraft by precautionary attachment, while safeguarding the rights of genuine creditors.

'Precautionary attachment' is defined as any act in the nature of an arrest carried out on behalf of a creditor, secured or unsecured, before judgment. This explains why the Convention has not yet been adopted by the United Kingdom, since English law does not yet recognise charges on aircraft analogous to charges on ships nor does it admit proceedings in rem against aircraft similar to proceedings in Admiralty against ships.[21]

The Convention starts by exempting altogether from precautionary attachment, various categories of aircraft, immobilisation of which would interfere with a public service: these include

[21] The possibility of such proceedings seems to be admitted by the Air Navigation Act, 1920, s. 14 (2), which gives power by Order in Council to apply Admiralty law and procedure to aircraft. There would seem to be an evident utility, in the interest of English creditors, in making this order. Many other States have given similar powers which can be, and have been, invoked against British aircraft.

postal aircraft, aircraft operating on a scheduled service,[22] and aircraft carrying passengers or goods for reward when ready to take off—an exception being made in the latter case, where the debt in question relates to the journey about to be, or being, undertaken.

In respect of all other aircraft, provision is made for the release of the aircraft on security being deposited : this must be sufficient to cover the amount of the claim or the value of the aircraft.

While the principles of this Convention seem sound enough, there is already room for dispute and litigation regarding its applicability to concrete cases, especially in the definitions of the aircraft exempt from attachment. It may in fact be questioned whether it will avoid more litigation than it creates.[23]

Proposed Convention relating to Aerial Collision

A draft Convention regulating the liability of operators for damages resulting from aerial collisions, was after many years of preparation (rapporteur Professor Ambrosini, Italy), adopted at the plenary meeting of CITEJA in 1936 and submitted to the Fourth International Conference on Private Air Law at Brussels in 1938.

This draft Convention was based, to some extent, upon the Convention on Maritime Collisions signed at Brussels in 1910. In addition, it established a basis of liability somewhat similar to that of the Rome Convention (see above), *i.e.*, according to weight, with the same minimum and maximum, and with a similar appropriation of one third to property and the remainder to persons.

Liability was, however, based upon negligence, a proportionate liability arising in the case of concurrent negligence and an equal liability if no proportion could be determined. The draft also attempted to deal with the liability of operators of colliding aircraft for damages caused to third parties on the surface.

At Brussels a number of observations were made upon the draft. The United Kingdom delegation pointed out some anomalies which would arise in working out the liability of operators in different cases (a) to their own passengers and consignors under the Warsaw Convention and (b) to the passengers of the other aircraft. The U.S. delegation also pointed out the risk of overlapping between the provisions of this proposed Convention and those of the Warsaw and Rome Conventions. As a result the draft was remitted to CITEJA for further study. Some further study was, in fact, given to this draft Convention by CITEJA, both at its plenary

[22] It has, so far, been impossible internationally to define a ' scheduled ' service, important though the distinction between ' scheduled ' and ' non-scheduled ' is for the purposes of the Chicago Convention (Arts. 5 and 6).

[23] The right of seizure on patent claims is already dealt with by the Chicago Convention (Art. 27). See also Air Navigation Acts, 1920, s. 13, and 1947, s. 3.

meeting in January, 1946, and in Cairo in November, 1946, but, on account of more pressing tasks, was not concluded; fortunately, air collisions have not, so far, been sufficiently numerous to call for the establishment of an international rule of law. This, therefore, is one of the matters which will have to be carried further by the Legal Committee of ICAO, probably in conjunction with the next following subject.[24]

Global Limitation of Liability of Operators

CITEJA has given much consideration to the position of operators of aircraft who may incur simultaneous liability under two or more Conventions. The possibility—in the case of a collision over land—of claims arising under the Warsaw and Rome Convention and under the proposed Convention on aerial collisions is a real one, and a position might arise where, in spite of the respective limitations established by each individual Convention, the total liability of an operator might reach unmanageable proportions. The difficulties, however, of fixing any overall—or global—limitation were found to be very great. Liability under which Conventions ought to be included : should priority be given to any class of claim : what would happen if some States ratified all the applicable Conventions and others only one or two : these were some of the problems which arose and which have not, so far, found a solution. Certain concrete suggestions—too elaborate to be examined here—were made however, by the rapporteur (Professor Ambrosini), beyond which it has so far not proved possible to go. It seems that further progress must depend on wider experience being gained and upon the development of jurisprudence in air law.

Recording of Ownership in Aircraft and of Mortgages in Aircraft

It was realised at the very beginning of the work of CITEJA, that some form and mechanism of international recognition ought to be provided for title in aircraft and for charges on aircraft—comparable to that which exists in maritime law by custom and (as to charges) by the Brussels Convention on Maritime Liens of 1926. This resulted in the preparation of two draft Conventions in 1927 (rapporteurs Dr. A. Giannini and Dr. A. Richter), one dealing with ownership of aircraft and the other with charges. These two draft Conventions were approved by a plenary meeting of CITEJA in 1931. The first draft provided for the setting up in each State a system of registration of title, for the protection

[24] Since the above was written the Legal Committee of ICAO has referred further study of this draft Convention, together with the following subject, to a sub-committee of which the writer is a member.

of third parties dealing in good faith on the basis of entries in the register and for the transfer of aircraft from the register of one State to that of another. The second draft provided for entry on the register of title of all mortgages or charges on aircraft established according to the national law of the aircraft, conferred priority on such registered mortgages or charges (by date of registration) over all other claims against the aircraft except ' privileged ' claims, and specified a number of ' privileged ' claims entitled to priority even over registered mortgages or charges, which included salvage dues, expenses on repairs necessary for the preservation of the aircraft, and airport and navigation dues incurred in the course of the last voyage. Further, this draft contained a number of provisions relating to execution and attachment of aircraft.

In spite of the detailed character of these draft Conventions, and their approval by the Committee, it was felt that further examination of the subject matter was required : at any rate no action was taken to place them upon the agenda of a diplomatic conference.

The next step was taken at the Chicago Conference in 1944 : a recommendation (No. V) was there adopted that ' the various governments represented at this International Civil Aviation Conference, give consideration to the early calling of an international conference on private international air law for the purpose of adopting a convention dealing with the transfer of title to aircraft and that such private air law conference include in the bases of discussion ' the drafts approved by CITEJA in 1931.

In accordance with this recommendation, intensive study has been given by CITEJA to this subject. At the plenary meeting in January, 1946, it was decided to combine the two draft Conventions into one : at the Assembly of PICAO in May, 1946, a draft was prepared together with a questionnaire which was circulated to governments. This draft elaborated the provisions regarding registration in a manner suggestive of the Torrens system of land registration. At the plenary meeting of CITEJA in November, 1946, the PICAO draft was examined and replies provided to the questionnaire : in February, 1947, a special committee met in Paris and produced a fresh draft of the combined Convention : finally in May, 1947, at the assembly of ICAO a drafting committee produced yet another draft of a simpler and less ambitious character, reverting more closely to the terms and conceptions of the 1926 Brussels Convention. This draft has been circulated to governments with the expressed hope that a final decision may be reached by

CITEJA'S successor, the Legal Committee of ICAO, at its first meeting.

The subject matter of this draft Convention (it seems certain that only one Convention will now emerge) raises indeed, questions both of urgency and unusual difficulty: of urgency, since the financing of aircraft construction demands not only that machinery exist for the raising of money on the security of aircraft, but that international recognition be given to the security so established: of difficulty, on account of the fluid condition of the various national laws on the subject.

There is not space in this article fully to discuss the legal problems which arise from an attempt to create an international law of title to and mortgages in aircraft: they can merely be briefly indicated :—

1. Not all States have hitherto formulated their own domestic law on the subject. To the knowledge of the writer, only Brazil, Finland, France, Greece, Italy, Norway, Portugal, Uruguay and Yugoslavia have enacted legislation to authorise mortgages on aircraft. U.S.A. legislation authorises charges to be created on aircraft in a number of alternative forms, which have already been applied to railroad stock. So far as the United Kingdom is concerned an aircraft would have to be treated as a chattel, and charges on aircraft would be subject to the provisions of the Bills of Sale Acts.

2. Wide divergencies exist in the legal conceptions of various States relating to mortgages and charges, and their effects. While there is no objection against, and indeed, much in favour of allowing each national law to determine its own methods, obstacles are encountered when other States are required to give their recognition: for example, recognition of the American 'equipment trust' presents difficulties to a number of States. In the absence of express regulation, it cannot be said that private international law has any settled rules which would deal with the case.[25]

3. When there is a question of a judicial sale of an aircraft, at the instance of execution creditor, difficulties exist in the determination of the extent to which the law of the forum should be applied as against mortgagees. Should, for example, a judicial sale of a mortgaged aircraft be made subject to the mortgages, or should (according to the Continental practice) encumbrances be discharged out of the proceeds of sale?

4. What latitude should be given to domestic legislation to confer priority for the State's revenue claims over mortgage debts?

5. All substantial airlines necessarily maintain large stocks of

[25] See J. H. Morris in *B.Y.I.L.*, 1945, p. 232.

spare parts, and desire to lodge them at various stations abroad to which the aircraft is likely to fly. These large stocks cannot be maintained without the provision of finance, and those providing the finance naturally desire security. What method can be adopted to secure charges on a floating stock of these articles?

6. Many airlines borrow money on the security of 'fleet mortgages', *i.e.*, a floating charge on the whole fleet. How can these mortgages be given effect to, when one aircraft of the fleet comes under the jurisdiction of a foreign court?

A solution will have to be found for these and other questions of difficulty, before the Legal Committee, which is to succeed CITEJA, can produce a Convention which is likely to gain any substantial measure of acceptance.

Draft Convention on Legal Status of Aircraft Commander
Draft Convention on Legal Status of Crew of Aircraft [26]

These subjects have been under study since 1927. At the plenary meeting of CITEJA in November, 1946, the opinion was expressed by certain delegations, that the question of the legal status of the aircraft crew raised questions of labour relations which might require detailed consideration from the point of view of domestic law: this draft Convention was, therefore, not proceeded with further. A final draft of a Convention on the Legal Status of the Commander of an aircraft, was, however, agreed by the Committee and transmitted to ICAO. This draft Convention defines the aircraft commander, his authority with respect to discipline and safety measures over passengers, cargo and crew, the period during which his authority subsists and his power to bind his operator-employer in respect of expenses incurred by him to safeguard the aircraft and passengers. This draft Convention, which within modest limits, appears to be of general usefulness and sound construction, now awaits examination by the Legal Committee of ICAO.

OTHER MATTERS UNDER CONSIDERATION BY CITEJA

Numerous other subjects have been examined from time to time by the Committee, here it must suffice merely to refer to their titles. A glance at these will show that the motive for their discussion came in many cases from analogies with maritime law; in others some national interest caused the question to be raised. In all of them it has been found on examination that the time was not ripe for definite action at this stage; meanwhile a store of

[26] The original rapporteurs were M. Thieffry (Belgium) and Prof. Babinski (Poland). M. A. Garnault (France) has succeeded to their work.

preparatory work has been laid by to await the developments of experience. The list of subjects is the following :—

General average.

Abandonment.

Jettison.

Contribution of postal freight to remuneration for salvage.

Hire and charter.

Authority of judgments in air matters.

Insurance of aircraft and operators.

This list, coupled with the subjects more fully indicated above, sufficiently indicates both the scope of the work performed by CITEJA and the width of the field which remains for its successor.

THE INTERNATIONAL GUARANTEE OF THE RIGHTS OF MAN

By W. Harvey Moore

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Honorary Deputy Secretary of the International Law Association

Edmund Burke referred to the Declaration of the Rights of Man and of Citizens adopted by the National Assembly of France in 1789 as 'paltry and blurred sheets of paper about the rights of man'. And there must be many who, looking round on the world today, will be found to wonder whether his contempt was just. Historically and formally, certainly not. Since that great pronouncement, 'rights of man' have found their way into numberless constitutional enactments, and the second world war has occasioned countless 'sheets of paper', some of them 'blurred', but few 'paltry'; for the hope of spreading more widely, and establishing more soundly, great principles of human behaviour in society cannot fail to dignify every such endeavour.

M. Réné Brunet,[1] a Professor of Law, and former Minister of France and delegate to the League of Nations, has brought to his task of expounding and analysing the more famous pronouncements on the political and economic rights of men a judicious eloquence which is not always found in Ministers of State. His book is based upon a bibliography (confined to publications since 1939) of 29 official and 185 private treatises. Incidentally, it is interesting to note the countries of origin of these. Of the 185 private publications, no less than 105 emanate from the United States of America, 38 from the United Kingdom, 16 from France, 13 from Switzerland, and 13 from various countries including South America; though the U.S.S.R. is not represented. Two comments are prompted by these figures; first, the debt that modern international law owes to the devotion and resources of citizens of the United States; and second, how regrettable it is that cultural intercourse with the chief upholders of Communist ideology is not more intimate, constant, and mutually fruitful.

From the expository portion of M. Brunet's book several

[1] His book on *La Garantie Internationale des droits de l'homme* was reviewed *supra*, p. 397.

interesting features emerge. Space forbids the citation of more than two. One is the analysis of the Soviet Constitution of 1936. This, in its Chapter 10, placing the social rights in the forefront, establishes the right to work with consequent elimination of 'economic crises' and unemployment; the right to leisure with a seven-hour day and workers' holiday and convalescent centres; rights of social insurance and education (but without rights of property or the right to strike); and individual liberties, of conscience, press, meeting and association, and the inviolability of the person, domicile, and correspondence (but without the personal liberties of going and coming freely out of, and perhaps within, the country; or the right to teach freely). These liberties, by Art. 125 are guaranteed by the law 'in conformity with the interests of the workers and with the end in view of strengthening the socialist system'—a qualification which, unless administered by completely independent (I do not mean unsympathetic) judges is bound to be open to political abuse. Art. 127 guarantees liberty of person, but allows arrest 'Sur ordre d'un magistrat (ce qui est normal) ou sur sanction du procureur—disposition qui, à l'évidence, prive les individus d'une garantie universellement tenue pour essentielle'. Art. 126 refers to the supreme role of 'le Parti communiste', and Art. 141 prescribes an electoral system which limits effective power to those presented to the electorate by Soviet organisations.

It is but right to remark, however, that these provisions are justified as an interim measure (which it is to be hoped imports a flavour of apology) pending the effective transformation of the State to the Socialist system, and pending its secure establishment. Freedom-loving lawyers in 'bourgeois' States do not always realise the degree to which their poorer fellow-citizens, by lack of means, organisation, and education, are deprived of boasted 'liberties', or the degree to which men who are economically subordinate, because property-less, not unnaturally place a higher value on economic security which affects all, rather than on political security which, in the average lifetime, affects some only.

The other noticeable feature to which this study calls attention is the degree to which during the war years grand ideals have been whittled down by later 'trimming' or omission. Thus the Atlantic Charter possessing, as any good declaration must do, some of 'the thunders of Sinai' with its 'do not seek any aggrandisement, territorial or other', and 'do not desire any territorial modification which is not in accord with the wishes freely expressed of the peoples interested' was adopted on January 2, 1942, by twenty-six States, including Great Britain, the U.S.S.R. and the

U.S.A.; nineteen other States gave their adherence on January 1, 1945.

Those who think that sovereign States should, above all, regard their word as their bond, and who support the doctrine of 'sovereign equality' (which grows in power, as these pages show, while ideals recede) will find much cause for disappointment. The trouble with the modern 'sovereign' State is that it finds it so difficult to behave like a 'sovereign'. And there can be no happy future for the world when citizens, who are free to express themselves, do not protest and protest again at the chicanery of forty-five important States endorsing a great declaration like the Atlantic Charter, and then behaving like vote-catching politicians when power is achieved.

The United Nations Charter is silent, or at least lisps in a very squeaky voice, on these eight tremendous principles. Similarly, one of the 'Postulats' of the 200 jurists whose work preceded Dumbarton Oaks was 'la souveraineté est soumise aux limitations du droit international'. Dumbarton Oaks omitted this too. But none of the great declarations of history, from the days of Hammurabi to the days of Grotius and Bentham, would have sprung from the lips of cautious men. Moses had no human legal adviser.

Nevertheless, pessimism as well as optimism and enthusiasm, needs to be controlled, and it is to be hoped that the work of the Human Rights Commission, and further study and enunciation of the 'human rights' references contained in the U.N. Charter will bear fruit in time. As to that, M. Brunet, having in Chapter 4 analysed with critical acumen the various 'fundamental liberties' one by one, turns in Chapter 5 to the vital question of guarantees.

In his 'Rapport Général to the Conférence du Droit en service de la Paix', organised by the Association des Juristes Démocrates in Brussels in July, 1947, M. le Bâtonnier Botson said, 'Even in the Fascist constitutions the most narrow and the most stringent rights of man are affirmed and in appearance protected. It is by the putting into application of principles that one judges if they are effectively respected, and what men ought to obtain is an efficacious guarantee in this respect'. Guarantee is a function of judicature. Both nationally and internationally, judicature—the process of independent judgment and declaration—is far from being given its due place today. Increasingly lawyers serve the executive, and the judge's supreme role is abused, curtailed, or denied. Economic rights, in days of economic complexity, must doubtless be declared by the Legislature, but it is arguable that the judiciary, even in this sphere, need not have been so backward in the past in witnessing *ex aequo et bono* in relation to manifest

economic injustices. Fears, exaggerated fears, of 'judicial sabotage' often expressed by 'progressives' have their origin in this reluctance. It is the duty of the judge to denounce inequity wherever he finds it. The foundation of constitutional and other equities, and the system of commercial law and the rights of negroes in England, was the work of forthright judges of the calibre of Chief Justice Marshall and Lord Mansfield.

The problem of a guarantee for human rights is a problem of judicature. Political and electoral rights, on which juridically all other rights are based, depend for their effective recognition upon standards set by judges acting 'without fear or favour'. We could do with a few judicial martyrs nowadays; indeed, recent European history provides examples though they are not as well known or as highly honoured as they should be. Public refusal to judge is sometimes an essential duty of the judge's calling. For political 'trials' are impossible without political judges. Que MM. les assassins commencent!

In the address that the late President Roosevelt prepared for delivery on Jefferson Day, April 13, 1945, but did not live to pronounce, that famous statesman wrote 'if civilisation is to survive, we must cultivate the science of human relationships—the ability of all peoples of all kinds to live together and work together in the same world at peace'. That science, a vital aspect of which is the subject of M. Brunet's book, is the science of justice and the law in its widest as in its most detailed applications, and it is that science—which is also an art—that lawyers everywhere profess, and must serve.

EDITORIAL NOTES

THE LAUSANNE SESSION OF THE INSTITUTE OF INTERNATIONAL LAW

THE session of the Institute, held at Lausanne in the Hôtel du Château at Ouchy from August 6 to August 11 last, was the first session since the cessation of hostilities and some difficulty had been experienced in arranging the date and place of the meeting. The attendance on the whole was good, considering the difficulty of travel at the present time and the added complication in many States of getting permits and of bringing money out of the country for foreign journeys.

Being the first meetings of the Institute since 1937, death and the War had caused many gaps among the officers and members of the Institute. Some doubt arose at the outset as to who was entitled to preside over the session, but when the session opened, Baron Nolde was unanimously elected as President.

Sixteen associates were promoted to the rank of full member, and twelve new associates were elected : among them being Professor Lauterpacht, the Whewell Professor of International Law at Cambridge. These elections will go some way towards filling the many vacancies in the ranks of the sixty members and the sixty associates of the Institute. Two new honorary members were elected—M. Hammarskjöld of Sweden and M. Guerrero, the President of the International Court at The Hague. A new Treasurer had also to be found as M. André Mercier, who had watched over the finances of the Institute for many years, found he could no longer sustain the burden. Professor Sauser Hall of the University of Neuchâtel was elected to take his place.

Some useful changes in the Statute and Regulations of the Institute were adopted with practical unanimity for the purpose of giving the associates a greater share in the control of the Institute. Hitherto the presentation of candidates for election, and the election both of members and of associates, has been vested exclusively in the members. In future, associates will co-operate with the members in the presentation by the national groups of candidates for election to the Institute and in the election of associates.

The Institute also endorsed the steps which had been taken earlier in the year by its Bureau as an emergency measure for the creation under Swiss law of a ' fondation ' to hold the Institute's

property. After the completion of this administrative business the Institute was able to turn to the scientific items on its agenda.

The first subject dealt with was a draft Declaration on the 'Fundamental Rights of Man'. The subject came forward on the basis of a resolution and report prepared by M. Charles de Visscher. The sessions devoted to it were lively and illuminating. They resulted in the adoption with but one dissentient vote after much amending of the original text of the first annex to this Note. The Declaration as adopted by the Institute is printed in French because the Institute works in French : but it would be useful to have a good English version. The document is not one of which it is easy to produce a satisfactory English translation. If any readers of this 'Quarterly' would make a good English text of the Declaration and send it to the editors of the 'Quarterly' it would be very helpful.

The Institute also discussed at length and adopted a resolution in five articles on 'Conflicts of Law as to proof in matters of private law' (Annex 2). The subject is one of intricacy, and the text underwent countless modifications before it satisfied all who took part in the discussions.

The remaining subject dealt with at Lausanne was the 'Codification of International Law'. A resolution on the subject was adopted on the closing day of the meeting (see Annex 3). The resolution embodies the views put forward in the McNair Report on Codification presented to the International Law Association Conference at Prague [1] and those advocated by the Grotius Society.[2] It recognises the need for codification, but stresses the danger of attempts to bring this about through governmental action, as witnessed by the breakdown of the Codification Conference at The Hague in 1930. The resolution urges scientific research on both a national and an international basis in order to achieve agreement as to the present outlines of international law and thereby pave the way for codification. There seemed to be a general feeling of disappointment with the recent report of the United Nations Committee on Codification.

At the close of the session M. Charles de Visscher was elected President and Sir Arnold McNair Vice-President of the Institute for the ensuing session, which it was agreed should be held in Brussels in 1948.

The Institute received a cordial welcome and generous hospitality from the municipal authorities of Lausanne, but the closing days of the meeting were clouded by the death of M. André Mercier,

[1] *Infra*, p. 536.
[2] *International Law Quarterly*, No. 1, p. 38.

the former Treasurer of the Institute, who was a prominent citizen of Lausanne. It became necessary in consequence to cancel the dinner which is usually held at the close of a session.

C. J. B. H.

ANNEX 1

LES DROITS FONDAMENTAUX DE L'HOMME, BASE D'UNE RESTAURATION DU DROIT INTERNATIONAL

(*Déclaration adoptée par l'Institut de Droit International en sa séance du 9 août 1947 à Lausanne*)

L'Institut de Droit International,

Considérant qu'au lendemain d'événements qui ont ébranlé jusque dans ses bases une civilisation traditionnellement fondée sur le respect des valeurs humaines, il importe avant tout d'affirmer à nouveau certains principes qui répondent plus particulièrement aux exigences actuelles de la conscience juridique des peuples civilisés ;

Constatant que les régimes qui ont asservi et dégradé la personne humaine ont recherché dans cette subordination totale de l'homme à leurs fins politiques les moyens de se livrer à des entreprises d'agression et de conquête, et qu'il importe d'en empêcher à tout jamais le retour ;

Rappelant que les Etats Membres des Nations-Unies se sont assigné pour but de " réaliser la coopération internationale... en développant et en encourageant le respect des droits de l'homme et des libertés fondamentales" (art. 1er, 3° de la Charte des Nations Unies ; cfr. art. 55, littéra c)

déclare

I

La reconnaissance et le respect des droits inhérents à la personne humaine, que doit servir et non asservir l'Etat, sont intimement liés au progrès du droit des gens.

II

Cette reconnaissance et ce respect sont à la base de toute conception fonctionnelle du Pouvoir. Pouvoir qui puise son titre dans son aptitude à réaliser les fins individuelles et sociales de la personne humaine.

La diffusion de cette notion fondamentale dans l'opinion publique constituera un élément modérateur du Pouvoir : elle maintiendra l'Etat dans sa mission en le gardant contre la tendance des détenteurs du pouvoir à en abuser.

III

Un ordre juridique efficace entre Etats est inséparable du respect de la personne humaine dans l'ordre interne de chaque Etat.

Dans l'ordre international, la conception fonctionnelle et modératrice du Pouvoir reste obscurcie par l'emprise d'une tradition qui voit dans l'Etat souverain, organisme de sécurité et instrument de puissance, la forme la plus haute de l'ordre juridique.

IV

Affirmer le respect des droits de la personne humaine sans en assurer l'efficacité par des mesures effectives de garantie et de contrôle est insuffisant aussi bien dans l'ordre international que dans l'ordre interne.

V

L'Institut voit dans l'acceptation et la diffusion des idées consignées dans la présente Déclaration une condition essentielle de l'observation du droit international et de son développement technique.

ANNEX 2

LES CONFLITS DE LOIS SUR LA PREUVE EN DROIT PRIVÉ

(Résolutions prises par l'Institut de Droit International le 11 août 1947)

ART. 1

La preuve, en matière de droit privé, est administrée suivant la procédure de la *lex fori*.

ART. 2

L'admissibilité des moyens de preuve, leur force probante, le fardeau de la preuve et les présomptions légales, sont réglés par la loi applicable aux faits ou aux actes juridiques ou aux rapports de droit qu'il s'agit de prouver.

ART. 3

Toutefois, si la *lex fori* exclut ou impose des moyens de preuve pour des motifs tirés de l'ordre public, elle sera appliquée.

ART. 4

Dans les cas où la preuve d'un fait ou d'un acte pourra être faite conformément à la *lex loci*, la partie intéressée devra établir, selon la *lex fori*, que le fait a été accompli ou l'acte conclu dans le pays dont elle invoque la loi.

Art. 5

Si la *lex loci* est applicable, mais s'il est impossible de déterminer dans quel pays le fait a été accompli ou l'acte conclu, la preuve sera faite selon la *lex fori*.

ANNEX 3

LA CODIFICATION DU DROIT INTERNATIONAL

(*Résolution adoptée le 12 août 1947*)

L'Institut de Droit International

Reconnaissant combien est désirable une codification du droit des gens de nature à dissiper certaines de ses incertitudes et favoriser son observation,

Souligne les dangers que présenterait actuellement toute codification officielle suivant la méthode de la Conférence de Codification de La Haye de 1930, dans la mesure où elle fondait la force obligatoire des règles codifiées sur l'acceptation expresse des Etats. Une telle méthode aboutit à fournir à chaque gouvernement l'occasion de remettre en question, par son refus d'acceptation, des règles de droit que la doctrine et la jurisprudence considéraient, d'une manière générale, jusqu'à cette date, comme établies ; il existe de ce fait un risque d'affaiblir et d'ébranler le droit que la codification avait pour objet de préciser et de consolider.

L'Institut, sans écarter la possibilité de conventions et de déclarations internationales sur les objets pour lesquels elles seraient jugées réalisables, estime que, pour le moment, la contribution la plus importante à l'œuvre de codification consisterait à effectuer, sur le plan national et international, des recherches de caractère scientifique en vue d'arriver à la constatation exacte de l'état actuel du droit international. Cet inventaire servirait de base tant à un effort doctrinal qu'à un effort officiel entrepris suivant des méthodes jugées mieux appropriées, en vue de combler les lacunes du droit international et de parer à ses imperfections.

THE WIDER USE OF THE INTERNATIONAL COURT OF JUSTICE

Up to the present there is only one case before the International Court of Justice—that between the United Kingdom and Albania arising out of the incidents in the Corfu Channel.[1] This has probably induced the President of the court to inform recently the Sixth (Legal) Committee of the United Nations that the court was anxious to perform the judiciary role for which it had been created

[1] See *infra*, p. 549.

and to respond to all requests for an advisory opinion. He gave formal assurance that all affairs brought before the court would be given prompt consideration.

On October 22, the Sixth Committee referred to the Assembly three resolutions designed to encourage greater use of the court by the United Nations and related agencies.

The first resolution adopted by the Committee and which constituted a revision of an Australian proposal, declares that 'it is of paramount importance that the court should be utilised to the greatest practicable extent'. It recommends that the organs of the United Nations and the specialised agencies should, from time to time, review points of law which arise in the course of their work and seek advisory opinions from the court. Such questions may be those involving principles which it is desirable to settle and would include points relating to the interpretation of the United Nations Charter and the constitutions of specialised agencies.

The second resolution authorises the Trusteeship Council to request advisory opinions on legal questions arising within the scope of the Council's activities.

The third resolution, which is a revision of a joint French-Iranian proposal, points out the desirability of as many States as possible accepting the compulsory jurisdiction of the court, with as few reservations as possible. It further notes the advantage of including provisions for reference to the court in international conventions and treaties. The resolution recommends further that, as a general rule, States should submit their legal disputes to the International Court of Justice.

The debate on these resolutions began in the Sixth Committee on October 8, 1947. Dr. Herbert V. Evatt (Australia) observed that many important items had arisen from time to time on which the court had not been consulted. The Australian proposal was designed to provide machinery for general consideration of what legal questions could be advantageously referred to the court. It was also designed to facilitate the growth of a regular practice whereby the court would play an important role in the progressive development of international law.

Sir Hartley Shawcross (United Kingdom) said that the Charter indicated a frequent use of the court. Many fields of dispute were not covered by international law, but in those fields where it could be applied, the court should not be disregarded. It was far more difficult to disregard a decision by a judicial body than a political decision taken by the United Nations.

On the other hand, Dr. Durdenevsky (U.S.S.R.) criticised the

first and third resolutions as superfluous and contrary to the provisions of the Charter. He did not think that the unemployment of the court was a disquieting phenomenon. It was rather a proof that so far no situation had arisen in the international field which would necessitate a legal process between the Member States. The Australian proposal was contrary to the Charter because it made an unwarranted increase in the number of organisations authorised to request an advisory opinion of the court. Further, it would give the court the right to interpret the Charter, although no such provision was laid down in the Charter itself. The tendency to interpret all political issues from a legal standpoint would result in substituting the court for the Security Council for the solution of world problems, a procedure not envisaged in the Charter. The resolutions were superfluous if they repeated provisions of the Charter and illegal if they were contrary to the Charter.

Dr. Manfred Lachs (Poland) said that the main reason for the idleness of the court was not the unwillingness of the States to submit their problems to it, but rather the post-war situation. The task of peace-making was given to a different body than the United Nations. The functions of a judiciary could begin only when the process of peace-making was terminated and the peace treaties had become operative law. It was difficult to draw a strict line between political and legal problems, but it was certain that in time the importance of the court would increase. To force it to give decisions in political disputes might only weaken its prestige. He was prepared to support the Australian proposal subject to certain amendments.

General approval of the resolutions was expressed by the delegates of Argentina, Belgium, Brazil, Colombia, Czechoslovakia, the Dominican Republic, Ecuador, Egypt, France, Greece, Guatemala, India, Iran, the Netherlands, Sweden, the United States, the Union of South Africa, the United Kingdom, Uruguay, Venezuela, and the Yemen.

After revision of the three resolutions the Committee held its final discussion on October 22, 1947. Monsieur Rodionov (U.S.S.R.) said he still opposed the first resolution as indicating a desire to alter the Charter by interpretive methods. He also contended that the second resolution should not be approved until the Trusteeship Council made a formal proposal. To this the Committee's Rapporteur, Mr. Georges Kaeckenbeeck (Belgium) replied that it was not necessary to ask permission of the Trusteeship Council to grant it the authority to ask opinions. To wait for the Council

to ask permission would mean postponing the matter to the next session.

Mr. W. E. Beckett (United Kingdom) pointed out that, though the Charter did not say that the court was the sole organ to interpret the Charter, it did not say that the court was not to do so. The principal judicial organ of the United Nations could be asked to give its impartial, judicial opinion. To give such an opinion was not to change the Charter.

The Polish representative, supported by the Czechoslovakian representative, moved an amendment to the first resolution which would have had the effect of preventing the court from interpreting the Charter. This was defeated by thirty-eight votes to seven.

Finally, the first resolution was adopted by a vote of thirty-nine to seven; the second by thirty-eight to nought with six abstentions; and the third by thirty-seven to five with five abstentions.

[United Nations—Docs. A/C6/W5 and A/C6/W5 Rev. 1 and Add. 1.]

QUESTIONS AND ANSWERS CONCERNING THE NUREMBERG TRIALS

In the past two years I have delivered a considerable number of lectures on various aspects of the Nuremberg trials both to university and to non-academic audiences. At the conclusion of each lecture the audience was given an opportunity of asking questions, and it was of interest to note that these have tended to follow the same pattern. In this note I shall list the questions that were asked, and I shall give a brief résumé of the answers which I attempted to make to them. Such a list will suggest that the audiences were critical of the trials, but this impression is misleading because it is natural that those who were in agreement with my views should have remained silent while those who were opposed to them should have presented the conflicting arguments.

(1) *Question*: Will not the practical effect of these trials prove disastrous in the future as the civil and military leaders of a losing nation will fight to the end because defeat will mean death for them? As the rules of international law have been broken so readily in the past is there any reason to believe that the declaration that aggressive war is a crime will prevent ambitious men, who are counting on victory, from using force to achieve their ends? In other words will not the Nuremberg trials increase the bitterness of future wars without doing anything to prevent them?

Answer: No one will be so foolhardy as to claim that the Nuremberg trials will by themselves prevent future wars, just as

the conviction and execution of one murderer will not prevent other murders from being committed. There is also the possibility that the leaders of an aggressive war will prolong the war in the hope of escape just as a murderer, faced with the death penalty, will use all force in an attempt to evade capture. Against this must be balanced the possibility that the threat of ultimate punishment may have an effect on all but the most reckless men. There is evidence that the warnings issued by the Allies from time to time during the war that acts of cruelty would be punished did have a deterrent effect on a certain number of men. Moreover the differentiation made in the punishments at Nuremberg will be of importance because they have shown that all those who engage in a criminal conspiracy will not be treated in the same way. Thus engineer Speer did not receive the death penalty because he tried to bring the war to an end. But the Nuremberg trials will have a practical effect even though they may not be able to stop extremists such as Hitler. The fact that the four great Allied nations, together with the other nations who endorsed the trials, have in this dramatic form declared that aggressive war is a crime, cannot fail to have an effect on the world as a whole. We must not forget that a belief that certain acts are criminal has always had a compelling influence on the actions of people because there is an inherent tendency to be law-abiding. The enforcement of law follows on the recognition of law. By driving home the lesson that aggressive war is a crime, the Nuremberg trials will have made it less easy for a fanatic to lead his people into such an adventure. It is not only the fear of punishment which prevents men from acting in an anti-social manner: the realisation that their acts are wrongful may be an even stronger deterrent. Aggressive war has, in the past, been regarded with complacency by men who in other ways had the highest standards, because they did not realise the wickedness of such a war, disguised as it was by a false patriotism. The gallows of Nuremberg have destroyed the glory of war; no longer can such a conflict be regarded as a chivalrous contest between knightly competitors, for it is now seen in its true colours—the brutal destruction of millions of innocent lives.

(2) *Question*: Why were the prisoners at Nuremberg not tried by neutral judges? How can they be said to have had a fair trial if they were tried by their enemies?

Answer: The facts themselves have answered this criticism because no serious criticism has been made of the fair conduct of the trials. The evidence given at the trials has been published for all the world to read and study. No suggestion has been made that

any handicap was placed in the way of the defence, or that any evidence which the prisoners wished to give was excluded. Moreover the unusual provision in the Charter that the judges must give reasons for their verdicts was the most effective protection the prisoners could have received because it has enabled every one, by comparing the judgments with the evidence to decide whether a fair conclusion was reached. The fact that three of the defendants were acquitted shows how fair the trials were. The argument in favour of neutral judges is based on a misunderstanding of the judicial process. As Lord Wright has said, a prisoner is entitled to a fair trial but not to a neutral one. The administration of justice within a country would break down if the latter principle were accepted. Can a prisoner accused of committing treason against his own country ask for a neutral tribunal on the ground that the ordinary judges, appointed by the State, will be prejudiced against him? Can a spy demand that he should be tried by a neutral court on the ground that the judge belongs to an enemy country? The common sense of the world has enabled us in these cases to distinguish between a fair trial and a prejudiced one. If the prisoners at Nuremberg were entitled to demand neutral judges then the same can be said of all enemy spies and saboteurs tried during the war.

(3) *Question*: Why was the defence of superior order not recognised at Nuremberg? Were not the generals and admirals, in particular, bound to carry out their orders without question?

Answer: The defence of superior order, although superficially an attractive one, is in reality the defence of tyranny. If it were recognised within a State, then responsible government would cease. To take one obvious illustration: British constitutional government is founded on the principle that every officer of the State, from the Prime Minister down to the village constable, is responsible for his own acts and cannot shelter behind the King's command. This doctrine may give rise to apparent hardship in a few cases but it is a risk which every public officer must take. It may be true that General Yodl would have lost his post, and might even have risked his life, if he had refused to order the murder of Allied airmen, but this can be no ground for refusing to hold him responsible for an order which he himself recognised was contrary to the rules of international law. The Nuremberg Charter did provide that the defence of superior order might be taken into consideration in the mitigation of punishment, but even here it must be used with caution especially when pleaded by men in a position of authority. A general ought to be held to a stricter

liability than an ordinary soldier who has both less freedom of choice and less knowledge concerning the wrongfulness of his act.

(4) *Question* : Was not the trial based on *ex post facto* law? As the Allied jurists had denounced the Nazi regime for applying such *ex post facto* laws in their criminal trials how could they justify such a step on their own part?

Answer : This criticism is only applicable to the charges of waging an aggressive war, and doing acts against humanity. The law concerning acts in violation of the rules of war has been established for centuries and has been enforced in many cases. As the prisoners at Nuremberg were guilty of these crimes it would have been sufficient to convict them on this count alone. It is true that they did not kill their victims with their own hands but they were responsible for the acts which caused their deaths. Franck, the gauleiter of Poland, directly ordered the deaths of millions of men, women, and children, but Speer was also guilty because he knowingly used slave labour in circumstances which violated The Hague and Geneva Conventions. This, however, does not answer the question concerning aggressive war. The answer here depends on the nature of international law. International law, like the English common law, is not statutory in form, but is based on custom and common understanding. Its rules find their validity in general recognition. While it is true that before 1914 aggressive war was not regarded as a breach of international law, an entirely different point of view developed after 1918. The Pact of Paris (the Briand-Kellogg Pact) may be regarded as the final crystallisation of this new concept. It is noteworthy that during the years before 1939, the totalitarian nations paid lip service to this doctrine in their strenuous denials that they were acting in an aggressive manner. It is true that no attempt was made at that time to punish the aggressors in those countries, but law does not cease to exist because those responsible for its enforcement are too weak to carry out their duty. In the Middle Ages powerful barons frequently committed murder with impunity but this did not invalidate the law against murder. That law also was not based on a statute but was founded on general acceptance and understanding. It can be argued with more force that the charge based on acts against humanity is founded on an *ex post facto* law because no one could have contemplated in the past that a civilised nation would deliberately adopt such a course. But in such circumstances the objection to *ex post facto* justice is not applicable. The rule or principle against *ex post facto* law is one based on the law of

nature or reason which holds that a man ought not to be punished for an act which he could not know was criminal when he committed it, but can it be seriously argued that a man who has deliberately slaughtered millions of his fellow men ought to be entitled to raise such a plea when called upon to answer for his acts?

(5) *Question*: Would it not have been better to deal with the prisoners by executive act, as was done in the case of Napoleon, than to stage a trial when the conclusion was a foregone one?

Answer: The conclusion was not a foregone one as was shown by the fact that three of the prisoners were acquitted But even if no doubt had existed concerning the guilt of all the prisoners, this would not have affected the necessity for a trial. Even the most obviously guilty murderer can only be punished after a conviction in open Court, for by following the proper legal procedure the justice of his conviction is established publicly. This consideration is of particular importance in the case of the Nuremberg trials. The evidence on which the prisoners were convicted was rarely disputed by them, and it can be read word for word in the reports of the trial. The truth has been so clearly established in these pages that no future historian, however anxious he may be to defend the Nazi leaders, will be able to dispute that these acts were committed.

(6) *Question*: Was not the atom bomb which fell on Hiroshima as much a violation of international law as were the acts of the prisoners at Nuremberg?

Answer: This question raises the whole problem relating to aerial bombardment of cities. We must remember that it was the Germans who first bombed Warsaw and Rotterdam, and the Japanese who bombed Manila and Hong Kong. The attacks on the two former cities were not made part of the case against the prisoners at Nuremberg as it is not clear to what extent the bombing of cities is justifiable as an act of war. The atomic bomb dropped at Hiroshima did not differ juridically from the other bombs used during the war, although it was more devastating in its effect. It must be remembered that more people were killed in Hamburg during the two night raids than were killed at Hiroshima. The chief criticism that has been advanced against the use of the atomic bomb is that it was an unnecessarily cruel act as the surrender of Japan could have been achieved by dropping a warning bomb in an unoccupied area. This has been answered by Mr. Henry Stimson, then the U.S. Secretary of War, in an article in the *Atlantic Monthly* in which he stated that the United

States at that time only had two atomic bombs, and that it was not certain that both or either of them would work. If there had been more bombs it would have been possible to use one as a warning, but this would have been too great a risk when there were only two. If a man has six shots in his revolver he can afford to use one as a warning if he is being attacked, but if he has only one left he must shoot to kill. By the use of the atomic bomb the war was brought to an immediate end thus saving hundreds of thousands of American and Japanese lives that would otherwise have been sacrificed.

(7) *Question* : One of the avowed purposes of the Nuremberg trials was to convince the German people of the guilt of their leaders. Has it accomplished this?

Answer : It is difficult to answer this with any certainty, but the general opinion of the experts seems to be that the Germans showed little or no interest in the trials and were in large part indifferent concerning the result. The explanation that has been given for this surprising lack of interest is that the convinced Nazis still believed that the Fuehrer had always been right, but that he had been let down by his lieutenants. At the last moment the Fuehrer himself had ordered the execution of Göring so it did not matter whether the Allies executed him or not. Whether the next German generation will be more influenced by the trial cannot be predicted with any confidence. That some of them will read the record is certain, and that this may bring some of them to a realisation of what the Nazi leaders did is possible, but that such a result will have an appreciable effect on the thinking of the country as a whole is highly unlikely. In this regard—and only in this regard—must it be said that the Nuremberg trials failed to accomplish their purpose.

(8) *Question* : What do you consider were the most important contributions made by the Nuremberg trials?

Answer : The first is that they succeeded in bringing to punishment the men who were responsible for some of the most terrible acts in the history of the world. The second is that they established for all time an undisputed record of these acts. The third is that, whether we agree or not that aggressive war was a crime in International Law in 1939 when the Nazis first invaded Poland, there can be no question that the trials have furnished a precedent of the greatest force for such a conclusion in the future. Finally, the trials have supplied a dramatic illustration of the triumph of law and order over the brutal exercise of arbitrary power. In the same hall which had resounded in the past with the furious yells of

Nazi prosecutors and their subservient judges, the calm quiet voice of justice pronounced the doom of those who had sought to destroy the souls of all decent men. It is in this vindication of justice and right that the triumph of Nuremberg can be found.

A. L. GOODHART.

PRE-WAR CONTRACTS IN THE PARIS PEACE TREATIES, 1947 [1]

THE Peace Treaties signed in Paris on February 10, 1947, by the Allied and Associated Powers of the one part, and by Italy, Rumania, Bulgaria, Hungary and Finland of the other part contain provisions on pre-war contracts for which the Peace Treaties concluded after the first World War served as models. The characteristic feature of both groups of treaties is that they neither dissolve nor maintain pre-war contracts between nationals of States who afterwards became enemies. They make the dissolution or maintenance of contracts dependent on the municipal law of the respective countries. If, and from the date at which, any two of the parties to the contract became enemies, *i.e.*, when trading between them became unlawful under the municipal law to which one of the parties was subject, the pre-war contract was deemed dissolved. The Paris Peace Treaties contain, however, one restriction which was not provided for by the earlier treaties, namely, that a contract is only dissolved when it required for its execution intercourse between the parties. This restriction results in some contracts being maintained which under the earlier treaties were dissolved, namely, contracts the execution of which did not require intercourse, particularly restrictive covenants and further suspensory clauses by which it is provided that the contract shall not operate during the war.

The treaties of 1947 conform with the earlier treaties in that they exempt from dissolution pecuniary debts which have arisen under the contract. The term 'pecuniary debts' excludes claims for specific performance, but presumably includes claims for unliquidated damages. Although the text of the treaties refers only to debts which became payable before the coming into force of the treaty, it is submitted that debts are equally maintained which become payable only after that date.

The contract is not avoided with retrospective effect, but abrogated in respect to the future. The consequences ensuing from the dissolution of the contract are governed by the municipal

[1] Résumé of the paper read before the Grotius Society by Dr. Ernst Wolff on December 3, 1947.

law applicable according to the conflict of law rules. That applies particularly to the repayment of sums paid under the contract afterwards dissolved and generally to the refunding of unjustified enrichment. The provision in the treaties that the dissolution of a contract shall not relieve a party from the obligation to repay amounts received as advances or as payments on account, does not—so it is submitted—create such an obligation, but presupposes that such an obligation exists under the municipal law.

By contrast to the earlier treaties, the treaties of 1947 do not contain categories of contracts which are saved from dissolution, nor do they empower the Allied or Associated Governments to require the carrying out of contracts otherwise dissolved in the general interest. It is submitted that in spite of the absence of a provision to that effect, a contract remains in force by which proprietary interests or concomitants of rights of property have been created.

Disputes arising out of pre-war contracts have to be decided by Conciliation Commissions to be established between each of the contracting Powers. The provisions in the treaties concerning such Conciliation Commissions are much shorter than the provisions in the earlier treaties concerning the Mixed Arbitral Tribunals. The character and the tasks of these Commissions are therefore by no means clear. It is, however, submitted, although with great reserve, that the Conciliation Commissions, if they fail to bring about a conciliation between the parties, must base their decision on law and have not to decide '*ex aequo et bono*', that not only Governments, but also private parties have access to the Commissions; and that the municipal courts of the countries concerned are deprived of their jurisdiction to the extent of the jurisdiction enjoyed by the Conciliation Commissions.

INTERNATIONAL LAW ASSOCIATION
PRAGUE CONFERENCE, 1947

THE 42nd Conference of the International Law Association was held at Prague in September, 1947, in the academic premises of the old Charles University which, as Dr. Zourek, Director-General of the Czech Foreign Office, said in his Presidential address, had been the headquarters of a division of the Waffen S.S. only some years ago : ' si une Conférence internationale consacrée au droit se réunit aujourd'hui dans ce bâtiment, comment ne pas y voir la confirmation symbolique de la victoire de la justice et du droit sur la force brutale '.

The Conference, which was the first revival of meetings to take

place on the Continent of Europe after the second Great War, brought together people of different nationalities, speech, and outlook, all however imbued with the same spirit, the same aim, a common love of peace, a common desire for friendship and understanding. These were the words of Lord Porter, Chairman of the Executive Council, in his impressive address.

Of the matters discussed at the Conference, the problem of 'Human Rights' and the 'Development and Formulation of International Law' were the most important and attracted a more general discussion.

The United Nations Charter refers to Human Rights in the preamble and in various articles, in particular in article 55. The Economic and Social Council of the United Nations had already set up a Committee in 1946, under the Chairmanship of Mrs. Roosevelt, to prepare a draft International Bill of Rights for consideration by the Committee. Human Rights have also been the subject of a study by a Committee of the Grotius Society, consisting of Lord Porter, K. S. Carpmael, K.C., C. John Colombos, LL.D., Sir Cecil Hurst, Richard O'Sullivan, K.C., Lord Templewood and V. R. Idelson, K.C., Ph.D. This Committee had suggested, as part of the forthcoming settlement, the institution of some international machinery, charged with the duty of keeping constantly under observation the 'lot of the individual' in the different countries of the world. It would have to proceed, as does the International Labour Office, by way of inquiry and investigation of cases where remedial actions appear to be called for against oppression of individuals in any country of the world. A report of this Grotius Committee and a draft Bill prepared and referred to by Professor Lauterpacht in his book, *An International Bill of the Rights of Men*, formed the basis of discussion at the Prague Conference.

Professor Lauterpacht, in his comprehensive address to the Conference, referred to the numerous drafts and reports which had appeared in the two hemispheres in the last years and more particularly to the British Foreign Office draft. As he pointed out, the better plan consisted in not limiting oneself to a mere declaration of human rights, but in stressing above all the important question of the enforceability of the Bill of Rights. This question, however, as well as the question of the powers of the Commission, required careful study, and it was for this reason that Lord Porter and Professor Lauterpacht suggested a postponement of the original plan of submitting the Bill to this year's General Assembly. Instead a further study was required so as to provide proper means of implementing the Bill. Professor Lauterpacht made it quite

clear that there still existed considerable disagreement on the fundamental rights which the Bill should contain. There might be a measure of agreement on the rights of freedom, equality before the law, speech and religion, but there was none on political rights and the right to a free vote and free election, nor on social and economic rights. The whole matter therefore required prolonged scientific study. Moreover, some States would have to agree to substantial changes in their laws and practices, if the Bill of Rights was not to be reduced to the lowest common denominator.

In the interesting discussion which followed, Mr. Harvey Moore warned the Conference not to try to lay down too many human rights. In England there were only two basic human rights: freedom of the individual and freedom of election. Both were preserved in the hands of the judges and that is why they were safe. Dr. van der Molen (Holland) emphasised that few governments would be ready to accept the intervention of the International Organisation in matters which were essentially within the domestic jurisdiction of each State. Dr. Loewenfeld equally referred to the possible conflict between the international obligation of the members of the Charter in connection with human rights and article 2 (7) of the Charter of the United Nations excluding any intervention by States in the domestic jurisdiction of other States. So far as the law was concerned, it was established by the Permanent Court of International Justice in the case of the *Tunis Nationality Decrees* that if a State had undertaken an international obligation and the question arose whether it had fulfilled it, this could never be treated as a matter of domestic jurisdiction. Mr. C. G. Dehn added that there was nothing to prevent States which signed a declaration on human rights from embodying it in an international treaty and covenanting not to infringe those rights. Dr. F. Bienenfeld urged the conclusion of international conventions for the recognition of human beings as persons in law, including slaves, stateless and displaced persons; further for the eradication of the spirit of aggression and for the defence of the equality before the law, regardless of race, religion or sex. Dr. Eric Fletcher, M.P., demanded the addition of an article relative to the right of marriage. He emphasised that in India it had been the marriage ban, enforced with the utmost vigour through centuries by a religious, not a legal, ban that had been the primary cause of the sad divisions in that sub-continent. He regarded as one of the most retrograde laws, introduced in Russia, the recent prohibition of marriages between Russian and non-Russian subjects. Dr. Drucker (Czechoslovakia) deplored the negative influence of Hobbes and Hegel on human rights and emphasised the necessity of a return

to Christian principles and idealistic philosophy. Madame Kraemer-Bach (France) called for an International Court of law for the protection of human rights, the judgments of which could be carried out, if necessary, under the protection of an international armed force. M. Stenmans (Belgium) distinguished between natural and moral rights, the existence of which could not be contested nor their exercise restricted, as for instance the right to life, marriage, liberty, conscience and free opinion on the one side and political, economic and social rights on the other. Dr. Andrew Martin emphasised the necessity of the interpretation and enforcement of human rights in connection with their recognition in the Peace Treaties. Sheriff Murray regarded any compulsory military service in times of peace as an interference with human rights and demanded international protection therefrom. Prof. Baginski (Poland) called for a basic international definition of equality which would have to be considered before a Bill of Human Rights could be real and practical. Henry Cochaux (Belgium) laid stress, on behalf of the World Confederation of United Nations Associations, on a close co-operation between the latter and the International Law Association, since both Associations had been granted consultative status by the Economic and Social Council as international organisations having special competence in the field of activity covered by the Council. Mr. Hector Hughes, K.C., M.P., made it clear that the Bill of Human Rights depended upon the adaptation and codification of existing law. He suggested the appointment of a committee, consisting of statesmen, scholars and practising lawyers which should examine the existing drafts of the International Bills of Human Rights, now before the world, determine which was the most effective instrument for its purpose and consider the best means of implementing it. The Conference finally resolved : (1) To request the Executive Council to set up a committee for studying and reporting to the next Conference of the Association (due to take place in Brussels in September, 1948), on (a) the legal effects of the Charter of the United Nations in the matter of human rights, in particular in relation to article 2 (7); (b) the powers and the constitution of the Commission on Human Rights; (c) the contents in all their aspects and the enforcement of an International Bill of the Rights of Men; and (d) the interpretation and enforcement of human rights and freedom recognised in the Peace Treaties.

(2) To put on record and to transmit to the Secretary-General of the United Nations the considered view of the Association that the submission to the General Assembly of an International Bill of the Rights of Men should be preceded by adequate study on the

part both of the organs of the United Nations and non-governmental bodies, but that such submission to the General Assembly should not be delayed beyond the year 1950.

(3) To associate itself fully with the resolution of the Economic and Social Council of June 21, 1946, which declares that 'the purpose of the United Nations with regard to promotion and observance of Human Rights as defined in the Charter of the United Nations can only be fulfilled if provisions are made for the implementation of Human Rights and of an International Bill of Rights'.

The Conference then dealt with its second main topic, the 'Development and Formulation of International Law'. A Committee of which Sir Arnold McNair was the Chairman and Dr. C. John Colombos the Rapporteur, had prepared a report which had been submitted to the United Nations Committee of seventeen States appointed by the General Assembly to advise on the subject (Document A/AC 10/22), as provided by article 13 of the Charter. The latter directs the General Assembly to initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification.

In presenting the Committee's report to the Prague Conference, Sir Arnold McNair lucidly analysed the various issues raised by the codification of international law. One should not be content with a haphazard piecemeal development as shown by the vast amount of material contained in the volumes of the *Annual Digest* and other reports of international law cases, but an attempt ought to be made to co-ordinate and systematise the material. Two alternative courses presented themselves. The one would be the immediate codification of the existing rules of international law by reducing them into the form of international Conventions. But any attempt made to secure codification by governments would probably not only fail, but might have a positively harmful effect by checking the present growth of the rules constituting customary international law and unsettling well-established rules. The disappointing experience of the last great attempt so far made to codify substantial portions of international law—the Hague Conference of 1930—showed the danger of failure, when representatives of governments, bound by instructions and tradition to uphold their immediate national interest, were not able to adopt the free and objective point of view of expert scientific lawyers who can regard the matter as one of international interest. The other alternative course would be to leave codification to the future and meanwhile to make a co-ordinated effort to restate the rules of customary international law through unofficial channels. Sir Arnold felt encouraged in examining the movement which had produced

the American Restatements of Private Law. It would have been almost impossible to secure the agreement of forty-eight jurisdictions upon a statutory codification of American Private Law. But since these restatements were unofficial and compiled by leading lawyers on purely scientific lines, they had acquired a steadily increasing authority. But this unofficial work (to which one might also add the valuable research done by the Harvard Law School) would have a greater chance of success if it were backed by the administrative and financial support of the United Nations Organisation. The effect of the suggested restatement would make itself felt in manifold respects; it would have persuasive power on national and international courts and be continuously referred to by practising lawyers as well as by writers and teachers. But in order that this object may be achieved, faith would also be necessary. The sanctity of the rule of law must be felt by the whole international community. There must be a determination to rally behind the law and against the law-breaker. To achieve this, the law must be just, clear and certain.

During the discussion that ensued, Dr. Krob (Czechoslovakia) emphasised that the sociological changes brought about by great technical and scientific progress in recent years had given rise to a greater interdependence of the peoples of the world, and the movement of centralisation on an international basis would one day culminate in the establishment of an international legislature, judiciary and executive. M. Devèze (Belgium), after declaring his approval of the admirable piece of work done by Sir Arnold McNair's London Committee, felt that some discrimination should be made within the field of international law. Some topics were even now ripe for codification, since they were uncontroversial, while others were still in a state of international tension which would make it impossible to impose them on a State unwilling to subscribe to them. The work should be done on a national, then on a regional, finally on an international level. To effect this object, a federation of all scientific associations would be desirable. M. Bierzanek (Poland) admitted that the delimitation of international and municipal law was undergoing a change. What used to be entirely a matter for domestic jurisdiction had now international repercussions, *e.g.*, the subject of human rights. He viewed restatement with optimism. Mr. Jaffé (General Secretary of the Association) reported that the decision in favour of a membership of seven on the Restatement Commission had been reversed in favour of a membership of fifteen, obviously to enable the co-operation of the smaller States, and that the United Kingdom proposal that the steering Committee which would distribute the

work amongst the States should be appointed by the International Court of Justice at The Hague, had been rejected. It is to be hoped that this was not final. Dr. Jansma (Holland) doubted whether the well-known differences of opinion on such subjects as Territorial Waters and the Laws of Nationality would not prevent governmental ratification or even the exercise of only persuasive authority on municipal courts. Dr. Colombos regarded Dr. Jansma's view as unduly pessimistic. He reminded the Conference of the method adopted in England by the periodic reports of the committees appointed by the Lord Chancellor for the review of special topics, and the permanent value of the American Restatements of Law. It became the common practice for American lawyers to refer to the Restatements in the briefs submitted by them to the courts which were also largely quoted in the judgments of the U. S. courts. Similarly a restatement of the main principles of international law would have great authoritative value in unifying and ascertaining the existing rules and in developing these rules in the future. Professor Lauterpacht expressed his conviction that codification was certainly possible and practical. The relatively great work that was done by the Hague Convention on the conduct of war by land and sea and on the treatment of prisoners of war (both highly controversial topics) clearly endorsed this view. M. Ancel (France) emphasised that the restatement could only be done by individual expert lawyers, bound by their wisdom and conscience, and not by government officials. He thought that a codification of the rules of private international law was equally important and that it should have the support of the Conference. Dr. Drucker (Czechoslovakia) suggested that the special codification branch of the legal department of the United Nations should have its seat at Geneva or at The Hague where the atmosphere would be more congenial than at New York. Finally Judge Brinton (U.S.A.), a member of the American Institute of Law which was responsible for the American Restatements, showed how the unceasing efforts of what he called 'the man at the head' in revising, correlating and reissuing the work for further consideration by his large number of collaborators were the corner-stone on which the whole enterprise rested. The American Institute of Law should be asked for its co-operation.

The Conference gave its general approval to the Committee's Report and accepted unanimously a resolution in the following terms :—

'The Prague Conference of the International Law Association (a) warmly welcomes in principle the recommendation of the Committee appointed by the General Assembly in regard to article 13,

para. 1 (a) of the Charter to the effect that an International Law Commission should be established for the purpose of giving effect to that paragraph; (b) considers that the recommendations of the members of the Commission to the General Assembly by the International Court of Justice as an expert, independent, and non-political body, should be more likely to provide a suitable Commission; (c) urges that the number of members of the Commission should be less than fifteen; (d) urges that the first and principal function of the International Law Commission should be to act as an organising or steering Commission and to establish a number of expert committees consisting not of governmental representatives but of unofficial persons distinguished for their practical experience or scientific knowledge of international law, one of whom should in each case be the Reporter of the Committee, and to charge these committees with the duty of preparing restatements of those portions of the existing rules of international law allotted to each of them, without attempting to secure the approval of Governments for these restatements; (e) asks the General Assembly to consider whether these committees would not, having regard to the special character of their work, be more likely to succeed in their tasks if the Assembly, while providing for close contacts with the legal department of the Secretariat of the United Nations, were to fix the seat of the International Law Commission and its staff at Geneva or The Hague; (f) urges that eventual codification by Governments following upon Diplomatic Conferences should be regarded as the ultimate aim of this work; (g) draws particular attention to the American Restatements of Private Law and the International Law Research done under the auspices of the Harvard Law School as examples of the method recommended; (h) is ready and anxious to render any assistance within its powers in the carrying-out of this policy'.

The Conference further dealt with a report of the Conflict of Law Committee concerning jurisdiction as regards sale of movable, corporeal goods. The report was submitted on behalf of the Committee by Judge Bagge (Sweden) and Arthur Jaffé. The reason why it was considered worth trying to get an international conformity as to the rules in this matter was the great importance to the commercial world of knowing in advance in which country adjudication upon claims founded on a contract of sale should take place. At present different rules of jurisdiction in different countries made it possible, if one has lost in one country, to go before the courts in another country. Contrary to this, the Committee's Report suggested that the parties should not in future have the choice between the jurisdiction of different countries.

Once the case was decided a party should not have the right to go to the court of another country to try his luck again to the prejudice of the other party. The Committee accordingly introduced international rules limiting the jurisdiction as regards the same contract, except where parties agree as to the competence of tribunals of another country. Otherwise there should in future be no more than one competent jurisdiction, and this should be the jurisdiction of the country where the defendant has his habitual residence or establishment. If, however, on demand of the claimant, the goods sold by contract have been seized as security for the claim, the courts of the country where the seizure was made should be competent. Where, according to the said rules, the courts of a certain country are competent to try the respective actions, the courts of another country (otherwise competent according to the national law) should refuse a hearing, if the action is lodged on demand of the party against whom the action is brought. Professor Gutzwiller (Switzerland), Dr. Matteucci (Italy) and Madame Kraemer-Bach (France), fully endorsed the views expressed in the report. Judge Hakulinen (Finland) wished to widen the field of application of the draft convention which in its present form was limited to goods sold under the contract and seized in contemplation of the proposed action and to replace the term ' goods sold by contract ' by the wider term ' goods belonging to the defendant '. Mr. Jaffé suggested that counter-claims brought against the plaintiff should have the benefit of the rule only if introduced without delay.

In adopting the report with minor amendments, the Conference decided to incorporate in the draft an article to enable a court to set aside the Convention for reasons of public policy. A motion to refer the draft convention to the Dutch Government for submission to the next Hague Conference was carried unanimously.

A further important subject discussed by the Conference was ' Jurisdiction and Recognition in Divorce ', a matter to which the Association had devoted a great deal of time and energy in the last seventeen years and which was now brought to a successful conclusion. The Oxford Conference of 1932 had already adopted the draft of a Convention on which, however, no action had been taken by governments. The subject was again discussed at the Cambridge Conference of 1946 and a Committee of the Association to which Mr. Latey and Mr. Dehn had contributed valuable work, was entrusted with the drafting of a new Convention. The draft submitted by this Committee was unanimously adopted by the Conference under the name of the ' Prague Convention '. Its main purpose is to ensure that any decree of divorce or nullity pronounced

by a competent court shall at the request of either the husband or the wife be recorded by a competent court of any of the other States signatories to the Convention with the same effect as if the decree had been pronounced by the recording court itself. Such recording of a foreign decree shall be compulsory, provided that the original decree was a final decree; that it was pronounced by a court having jurisdiction according to the *lex fori* by reason of either the domicile, the residence or the nationality of either spouse; that the principle of 'audiatur et altera pars' was observed; and that a certain minimum period had elapsed since the date of the original decree. The debate on the draft Convention in which Dr. Maida (Czechoslovakia), Dr. van Krimpen (Netherlands), Dr. Szer (Poland), Dr. Jansma (Netherlands), Madame Kraemer-Bach (France), Professor Gutzwiller (Switzerland), Mr. Eric Fletcher, M.P., Dr. Andrew Martin, Hector Hughes, K.C., M.P., Dr. E. Loewenfeld and Dr. F. Bienenfeld participated, was marked by the unanimous recognition of the great urgency of an international action in the matter. It was further marked by the appreciation of the great skill with which the drafting Committee, under the chairmanship of Mr. Latey, had found a common denominator for the divergent principles on which jurisdiction in matrimonial causes was based in the various systems of law. 'The Prague Convention' is now formally to be recommended to the various governments for examination and legislative action.

A publication of the proceedings of the Prague Conference, including the Committee Reports, is in preparation and is expected to appear in print during the course of 1948.

ERWIN H. LOEWENFELD.

THE PROPOSED INTERNATIONAL TRADE ORGANISATION. HAVANA CONFERENCE ON TRADE AND EMPLOYMENT

ON February 18, 1946, the Economic and Social Council passed a resolution that a World Conference on Trade and Employment should be convened, and set up a Preparatory Committee consisting of Australia, Belgium, Luxemburg Economic Union, Brazil, India, Lebanon, Netherlands, New Zealand, Norway, South Africa, Soviet Union, U.K., and U.S.A. The Preparatory Committee met in London and produced a draft Charter for an International Trade Organisation, based to a considerable extent on certain proposals on trade and employment (Cmd. 6709) communicated by the United States Government to the Government of the United Kingdom

on December 6, 1945 (the date of the conclusion of the loan agreement). A drafting committee of the Preparatory Committee met in New York in January, 1947, and further elaborated the draft Charter. The second session of the Preparatory Committee was held at Geneva in the summer of 1947 concurrently with multilateral negotiations between countries represented on the Preparatory Committee for the reduction of tariffs.

The World Conference contemplated in the resolution of the Economic and Social Council assembled at Havana in November, 1947, to consider the draft Charter for the International Trade Organisation evolved at Geneva. This Geneva text will now be referred to as the Draft Charter.

2. The Draft Charter is one of the most elaborate and far-reaching international instruments ever drafted.

This note will give an outline of what the Charter contains and draw attention to some of its legal aspects. The International Trade Organisation will be an inter-governmental organisation and when it has been brought into relationship with the United Nations will be the specialised agency of the United Nations in matters of trade.

3. Chapter I, containing a single Article, sets out the purpose and objectives of the Organisation, which are derived from Article 55 (*a*) of the United Nations Charter. There was much debate at Geneva whether it is proper to ascribe purposes to the Organisation, to the Charter or to the States parties to the Charter, and the real, fictional and collective theories of corporation all found support. It was decided that the expression ' purposes of the Organisation ' and ' purposes of the Charter ' should be avoided and that in Article 1 the States parties to the Charter should have a single purpose, namely, the realisation of the aims set forth in Article 55 (*a*) of the United Nations Charter and that the means of achieving this should be set out under six heads, called objectives. This made it possible for the mention in other parts of the Charter of general purposes and objectives to have a reasonably precise reference.

4. Chapter II deals with employment and economic activity. Employment in this chapter is to be understood, not as applying to labour conditions, rights and standards, but to employment as an economic factor in trade. It is true that Article 4 is in effect a resolution for the maintenance of fair labour standards, but it recognises that these fall within the sphere of the International Labour Organisation.

5. Chapter III contains provisions on economic development and in particular international investment.

Article 12 is of interest in that it lays down certain conditions for the protection of investments in foreign countries. Article 12 (2) (*a*) provides that ' with respect to existing investments or to future investments after they have been made, no member shall impose directly or indirectly, requirements on the investments of nationals of other members which are appreciably more onerous than those which the member imposes in similar circumstances upon its own nationals or upon the nationals of third countries '. This embodies the principles, slightly qualified, of national and most-favoured-nation treatment.

Article 12 (2) (*b*) provides that ' members shall make just compensation if the property, in which a national of another member has an interest, is taken into public ownership or placed under public management or occupation '.[1]

Article 13 allows Governments to give assistance to infant industries or industries under development or reconstruction in the form of protective measures, which would conflict with the provisions of Chapter IV prohibiting quantitative restrictions, provided that such measures do not discriminate against any particular member of the Organisation and provided further that the Organisation gives prior approval to the said measures after the member desiring to apply them has consulted with other members likely to be affected and reached ' substantial agreement ' with them. Prior approval by the Organisation will take the form of a release of the member proposing to apply the measures from such obligations which it has undertaken under Chapter IV of the Charter or under the General Agreement on Tariffs and Trade, as may be necessary.[2]

6. Chapter IV deals with commercial policy, and is divided into six sections: Tariff Preferences and Internal Taxation and Regulation; Quantitative Restrictions and Exchange Controls; Subsidies; State Trading; General Commercial Provisions; and Special Provisions.

Article 16 (1) establishes the most-favoured-nation standard between members of the Organisation. ' With respect to customs duties and charges of any kind imposed on or in connection with

[1] There is an explanatory note to the Geneva text of the Draft Charter that the word ' just ' covers all aspects of the payment of consideration or compensation, including adequacy and time of payment, from the point of view both of the payer and of the receiver, and makes it clear that compensation would not be payable where, because of a violation of a law in force, property has been forfeited or taken under public management or occupation, whether by executive action in accordance with pre-existing law or as a penalty under judicial procedure. The note goes on to explain that the payment of just compensation to a foreign national is, in so far as it is an obligation to make payment in currency, an obligation to make payment in the local currency of the payer.

[2] Negotiated in accordance with the provisions of Article 17 of the Charter. This will be referred to below.

importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 1 and 2 of Article 18, any advantage, favour, privilege or immunity granted by any member to any product originating in or destined for any other country, shall be accorded immediately and unconditionally to the like product originating in or destined for all other member countries respectively'.[3]

Article 17 imposes an obligation on every member of the Organisation to negotiate with other members the reduction of tariffs and the elimination of preferences. On October 30, 1947, a General Agreement on Tariffs and Trade was signed at Geneva, and a protocol of provisional application of this agreement was annexed; in accordance with this protocol, five countries including the United Kingdom and the United States of America undertook to apply the agreement provisionally as from January 1, 1948. Members of the Organisation, not contracting parties to this General Agreement, will become parties to it when they have carried out negotiations for the reduction of tariffs under Article 17 of the Draft Charter. The relationship between the Draft Charter and the General Agreement on Tariffs and Trade is too complicated for discussion here, and it is sufficient to say that the main link between them is Article 17.

Articles 20 to 24 are perhaps the most difficult Articles in the Draft Charter. They provide for the general elimination of quantitative restrictions on trade but permit wide exceptions to this rule where restrictions are imposed to safeguard the balance of payments or to achieve a reasonable rate of increase in monetary reserves. Where quantitative restrictions are imposed, Article 22 requires that they should be administered in a non-discriminatory way, but Article 23 introduces exceptions even to this rule of non-discrimination.

Article 24 defines the relationship between the International Trade Organisation and the International Monetary Fund, and in particular requires that the Organisation 'shall accept all findings of statistical and other facts presented by the International Monetary Fund relating to foreign exchange, monetary reserves and balance of payments, and shall accept the determination of the fund as to whether action by a member in exchange matters

[3] It will be observed that it is in a positive and unconditional form: see *British Year Book of International Law*, Vol. 22, 1945, for a valuable article on the most-favoured-nation standard.

is in accordance with the Articles of Agreement of the fund'. Where a member of the Organisation is not a member of the International Monetary Fund, it is required to enter into a special Exchange Agreement with the International Trade Organisation, and the provisions of this agreement will become part of the member's obligations under the I.T.O. Charter. The purpose of the special Exchange Agreement will be to impose on the member obligations similar to those which it would undertake had it been a member of the fund.

Article 30 is of considerable interest in that it lays down a rule for the conduct of State trading enterprises. The members undertake that 'such enterprises shall, having due regard to the other provisions of this Charter, make any such purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation and other conditions of purchase or sale, and shall afford the enterprises of the other members adequate opportunity in accordance with customary business practice to compete for participation in such purchases or sales'. This provision will come near to establishing as a rule of international law that where a State or Government engages in trade, it subjects itself to the same commercial and legal rules as a private trader.

Article 32 is a re-statement in shorter form of the principles embodied in the Annex to the Barcelona Convention, 1921. There are two differences; firstly Article 32 unlike the Barcelona Convention does not deal with persons as passengers; secondly, it includes the air transit of goods (including baggage) but does not apply to the operation of the aircraft in transit; the Barcelona Convention was not on the face of it applicable to air traffic. It may be noticed that as a consequence of paragraph 15 of the Annex to the Barcelona Convention [4] rights and obligations in relation to freedom of transit between the territories of the British Commonwealth will be governed solely by Article 32 and not by the Barcelona Convention.

Article 42 sets out a basic characteristic of the International Trade Organisation and will be considered in connection with Article 68 below.[5]

4 'It is understood that this Statute must not be interpreted as regulating in any way rights and obligations inter se of territories forming part of or States under the protection of the same sovereign State whether or not these territories are individually members of the League of Nations.'

5 'The rights and obligations arising under this Chapter shall be deemed to be in force between each and every territory which is a separate Customs Territory and in respect of which this Charter has been accepted by a Member in accordance with Article 99.'

7. Chapter V is aimed against restrictive business practices. Article 44 establishes a number of tests for determining whether a business practice by a public or private commercial enterprise is injurious, and therefore subject to the complaint procedure set out in Articles 45 and 47. It must affect international trade; it must restrain competition or limit access of markets or foster monopolistic control (examples of such practices are given in paragraph 3 of the Article); it must be engaged in by a public or private commercial enterprise or by a combination or arrangement between any such commercial enterprises; such commercial enterprises 'must individually or collectively possess effective control of trade between two or more countries in one or more products'; and a complaint must have been presented about the practice to the I.T.O. The definition of a public commercial enterprise is of interest.[6]

It is difficult on the Article as it stands in the Geneva Draft to distinguish between, for example, the limitation of production by agreement between State enterprises which might, in fact, constitute an international cartel, and limitation of production by a State enterprise or a governmental agency in the execution of a national production programme.

8. Chapter VI establishes a comprehensive body of rules for the conclusion of inter-governmental commodity agreements. In particular, Article 65 allows the Organisation to compel a member, which is participating in an inter-governmental commodity agreement at the time of its entry into the I.T.O., to modify or terminate its participation in the agreement, if it is found to be inconsistent with the provisions of Chapter VI.

9. Chapter VII is the constitution of the International Trade Organisation, and indeed the Draft Charter may really be divided into two parts: first, Chapters II and VI which form a general commercial convention; and secondly, Chapter VII which is a separate constituent instrument. The two parts are linked together by Chapters I and IX.

Article 68 deals with the membership of the Organisation. The fundamental qualification for membership is that any territory which is a separate customs territory and autonomous in the conduct of its external commercial relations, may become a member of the Organisation. It has long been recognised that territories which are not international persons in the strict sense, but are dependent territories of some State, should be entitled to participate

[6] 'In this Chapter the term public commercial enterprises means (a) trading agencies of Governments, and (b) enterprises mainly or wholly owned by public authority and over which there is effective control by public authority including control and engagement in a practice listed in paragraph 3 of this Article.'

in international conventions on a basis of equality or near-equality with States provided that (a) the convention is a technical one and does not import wide political obligations, and (b) the dependent territory concerned is, despite its political dependence on any State, self-governing in the technical matters covered by the convention. The Universal Postal Union was already applying this principle in the latter part of the nineteenth century and recent conventions in which it has been adopted are those of the World Health Organisation and the International Meteorological Organisation. Examples of territories which, while politically dependent on another State are separate customs territories and commercially autonomous, may be found in the British Commonwealth, *e.g.*, Ceylon and Southern Rhodesia. The constituent republics of the Soviet Union, though under the Soviet Constitution they are responsible for the conduct of their foreign relations, are not, in fact, separate customs territories.

Article 68 also contemplates admission to membership of the Organisation of trust territories administered by the United Nations and the free territory of Trieste.

There are two problems in the constitution of the Organisation which have given rise to a wide difference of opinion on the Preparatory Committee which prepared the Geneva text of the Draft Charter. The first is the composition of the Executive Board of the Organisation. Here debate has turned around the question whether certain States, members of the Organisation, should have permanent seats on the Executive Board because of their economic importance. Article 75 of the Geneva text contains three more or less detailed alternative schemes; but they all, in fact, recognise the principle that States of chief economic importance should have permanent seats. The expression 'permanent seats', is perhaps a slight misnomer; what is really intended is that certain States shall be designated or appointed to the Board, while the remaining seats on the Board shall be filled by election. A similar practice was followed in the constitution of the Security Council and of the executive directors of the bank and the fund. The second problem is that of voting in the Conference of the Organisation. The majority of the countries on the Preparatory Committee consider that each member of the Organisation should have one vote on the Conference. The minority favoured the system of weighted voting, the number of votes allocated to each member to be determined according to a formula based on such factors as population, share in world trade, national income, and proportion of trade to national income. Such a formula would yield steeply graded voting or a shallow grade according to the size of the basic vote

accorded to each member. The precedent for weighted voting is, of course, to be found in the system adopted by the bank and the fund.

Article 81 establishes a Tariff Committee. The functions of the Tariff Committee are to initiate negotiations for tariff reduction between those members of the Organisation which have become contracting parties to the General Agreement on Tariffs and Trade and members of the Organisation that will not have yet done so. It also would have powers under Article 17 (2) to apply sanctions to a member which failed unreasonably to carry out such negotiations. However, since it is contemplated that in course of time all or almost all members of the Organisation will have negotiated tariff reductions with one another and will have become contracting parties to the General Agreement on Tariffs and Trade, the Tariff Committee will exist for a transitional period only. The Tariff Committee will be composed of those members of the Organisation who are already contracting parties to the General Agreement on Tariffs and Trade.

Article 86 is concerned with the international legal status of the Organisation and states: 'the Organisation shall have legal personality and shall enjoy such legal capacity as may be necessary in the exercise of its functions'. This Article is declaratory since such an Organisation as the I.T.O. must be regarded as having in international law a personality which, while falling short of the full personality of sovereign States, is sufficient to give it capacity to perform its functions, and it was included in order to dispel the doubts which have sometimes arisen in connection with other inter-governmental organisations as to their capacity to make contracts under international law. It does not follow from this that an agreement made between inter-governmental organisations are 'international agreements' in the sense, for example, of Article 102 of the United Nations Charter; but they are nonetheless subject to international law.

10. Chapter VIII deals with the settlement of disputes. Article 89 has wide scope and requires members to consult together and, if necessary, refer to the Executive Board of the Conference under Article 91, any matter where 'any benefit accruing to a member directly or indirectly under this Charter is being nullified or impaired, or that the attainment of any of the objectives set forth in Article 1 is being impeded, as a result of—

(a) the failure of another member to carry out its obligations under this Chapter, or

(b) the application by another member of any measure, whether or not it conflicts with the provisions of this Chapter, or

(c) the existence of any other situation '.

Article 91 provides that any substantially interested member may require that an advisory opinion of the International Court of Justice be taken upon any legal question involved in any decision of the Conference of the Organisation. There is no provision in the Charter by which disputes between members may be referred to the International Court of Justice under Chapter II of its Statute.

Article 93 deals with the very difficult question of the commercial relations between members of the Organisation and non-members. The Preparatory Committee reached no agreement on this question, but submitted three alternative versions of the Article for consideration by the World Conference. The basic difficulty is to decide what shall be the effect of the Draft Charter upon pre-existing commercial and other agreements between members and non-members, and upon the rights of members to extend the benefits of the Charter to non-members under future agreements.

11. This note does no more than draw attention to some of the salient points in a very intricate instrument, hardly a line of which will not, if the I.T.O. operates effectively, become a subject for legal interpretation. The I.T.O. Charter as it emerges from the World Conference on Trade and Employment at Havana, will deserve study because it will be the first effort in history to subject international trading relations to general rules of law.

THE INCIDENTS IN THE CORFU CHANNEL CASE PENDING BEFORE THE INTERNATIONAL COURT OF JUSTICE

ON May 22, 1947, the British Ambassador at The Hague sent to the Registry of the International Court an application submitted by His Majesty's Government against the Government of the People's Republic of Albania.

The subject of the dispute is the claim of the United Kingdom Government : (1) that the Albanian Government either caused to be laid, or had knowledge of the laying of, mines in its territorial waters in the Strait of Corfu, without notifying the existence of these mines, as required by Articles 3 and 4 of Hague Convention No. 8 of 1907, by the principles of international law and by the ordinary dictates of humanity; (2) that two destroyers of the Royal Navy were damaged by the mines so laid, resulting in the loss of lives of forty-four personnel of the Royal Navy and serious injury to the destroyers; (3) that the loss and damage referred to in (2) was due to the failure of the Albanian Government to fulfil its international obligations and to act in accordance with the

dictates of humanity; (4) that the Court shall decide that the Albanian Government is internationally responsible for the said loss and injury and is under an obligation to make reparation or pay compensation to the Government of the United Kingdom therefor; and (5) that the Court shall determine the reparation or compensation.

The Government of the United Kingdom contend that the Court has jurisdiction under Article 36 (1) of its Statute, as being a matter which is one specially provided for in the Charter of the United Nations, on the grounds: (a) that the Security Council of the United Nations at the conclusion of proceedings in which it dealt with the dispute under Article 36 of the Charter, by a resolution, decided to recommend both the Government of the United Kingdom and the Albanian Government to refer the dispute to the International Court of Justice; (b) that the Albanian Government accepted the invitation of the Security Council under Article 32 of the Charter to participate in the discussion of the dispute and accepted the conditions laid down by the Security Council, when conveying the invitation, that Albania accepts in the present case all the obligations which a member of the United Nations would have to assume in a similar case; (c) that Article 25 of the Charter provides that the members of the United Nations agree to accept and to carry out the decisions of the Security Council in accordance with the Charter.

In early December, 1947, the Albanian agent filed with the Registrar of the International Court his country's counter-memorial on the case, registering the preliminary objection that the United Kingdom application is inadmissible. The objection asked the Court to place on record that by accepting the Security Council's recommendation of April 9, Albania was only obliged to submit the dispute to the Court in conformity with the provisions of the Statute and the Charter. The Court was also requested to judge that the United Kingdom, by proceeding unilaterally, had not acted in conformity with these provisions.

The President of the International Court made an order fixing January 20, 1948, as the time limit for the submission by the United Kingdom of observations on this objection. The public hearing of the objection begins on February 26, 1948.

REVIEW OF CASES

ADMINISTRATION OF ESTATES ABROAD

Re the Sixth Duke of Wellington, deceased. Glentanar (the Executors) v. *Wellington*

In the Court of Appeal (the Master of the Rolls, Lord Justice Cohen, and Lord Justice Asquith), December 9, 1947, the appeal and cross-appeal from the decision of Mr. Justice Wynn-Parry in the court below [1] were dismissed. The appeal and cross-appeal were brought not as to any question of the relevant Spanish law but on short points of construction of the wills. The notice of appeal on behalf of the defendant Edith Unwin (representing the estate of Lilian Maud, Duchess of Wellington, mother of the sixth Duke, who died after the proceedings had begun), gave notice of intention to move 'that the Order herein dated the 7th May 1947 may be reversed so far as it declares that upon the true construction of the Wills of the above named Testator . . . dated respectively the 6th May 1942 and the 6th December 1942 and in the events which have happened the defendant the Most Noble Gerald Seventh Duke of Wellington became entitled under the said Will dated the 6th December 1942 . . . to the moveable and immoveable property expressed to be disposed of by the said Will dated the 6th May 1942 of the Testator AND that it may be declared that upon the true construction of the said wills of the said Testator and in the events which have happened the moveable and immoveable property expressed to be disposed of by the said Will dated the 6th May 1942 of the said Testator is undisposed of and passes as on the intestacy of the said testator. . . .' The cross-appeal on behalf of the defendant Lady Anne Maud Rhys (sister of the sixth Duke), sought in substitution of the original order a declaration 'that upon the true construction of the said wills of the Testator and in the events which have happened the Defendants the Most Noble Gerald Seventh Duke of Wellington and Lady Anne Maud Rhys became under the said Will dated the

[1] See *International Law Quarterly*, Vol. 1, p. 235.

6th May 1942 entitled as joint tenants to the moveable and immoveable property therein mentioned. . . .'

The Court of Appeal, in dismissing the appeal ordered 'that the said Order dated the 7th May 1947 be affirmed but that the declaration hereinafter set out be substituted for the declaration in that Order contained And the several parties by their Counsel undertaking to concur in executing and doing all instruments and things necessary or proper for giving effect in Spain and elsewhere to the declaration hereinafter contained as to the true construction of the Wills of the testator dated respectively the 6th May 1942 and the 6th December 1942 or such other declaration as may be substituted therefor on any appeal from this Order DECLARE that upon the true construction according to the Law of England of the said Wills the property in Spain expressed to be disposed of by the said Will dated the 6th May 1942 was given to the Respondent the Most Noble Gerald Seventh Duke of Wellington beneficially and absolutely . . .'

Note. The reason for the inclusion of the first part of the Order of the Court of Appeal regarding the undertaking by counsel on behalf of the parties 'to concur in executing and doing all instruments and things necessary or proper for giving effect in Spain and elsewhere to the declaration' is an interesting one. On the opening of the appeal the Master of the Rolls required assurance that the court had in fact jurisdiction in the case, inasmuch as what was ultimately involved was the title to foreign land. Would the order of the court in fact be effective; what was to prevent one of the parties if so minded from subsequently bringing an action in the Spanish courts in order to establish that at Spanish law the direction given to the executors by the English court as to the administration of the estates was wrong?

The jurisdiction *in personam* of the English court was not, of course, in question, and, after the matter had been fully argued, it was on the basis of its personal jurisdiction—all the parties interested in the administration of the Spanish estate being represented in the action and undertaking by their counsel in the terms of the order to 'concur in executing and doing all instruments and things necessary or proper for giving effect in Spain and elsewhere to the declaration . . .'—that the court gave directions as to the construction of the wills.

ENTITLEMENT UNDER WILL DEPENDENT ON LEGITIMACY. QUESTION WHETHER LEGITIMACY AT BIRTH BY LAW OF DOMICILE OF CHOICE OF PARENTS SUFFICIENT AT ENGLISH LAW

Re Bischoffsheim, deceased. Cassel v. *Grant*

The Facts.

By his will the testator, Henri Louis Bischoffsheim, who died on March 11, 1908, devised and bequeathed his residuary real and personal estate to trustees on the usual trusts for sale and conversion. A share in the proceeds of such sale was given (subject to certain prior interests) to one of the testator's grandchildren, Nesta Pamela Fitzgerald, for life with remainder to such of her child or children as being male should attain the age of twenty-one years or being female should attain that age or marry. On April 30, 1908, Nesta Pamela Fitzgerald married Lord Richard Wellesley. There was issue of the marriage, two children, the defendants Mrs. Pamela Grant and Miss Mary Wellesley. On October 29, 1914, Lord Richard Wellesley was killed in action. On March 12, 1917, his widow married Lord George Wellesley, a brother of Lord Richard, in New York. The defendant Mr. Richard Wellesley was the only child of that marriage and was born on June 22, 1920. Lord George Wellesley died on February 21, 1946.

The present summons was brought to determine whether the defendant, Mr. Richard Wellesley, was entitled to a beneficial interest in the testator's residuary trust fund as being a child of Nesta Pamela Fitzgerald.

The Judgment (Mr. Justice Romer, Chancery Division, November 26, 1947).

The domicile of origin both of Lord George Wellesley and his wife was English, and by the law of England a marriage between them would have been void under Lord Lyndhurst's Act (5 & 6 Will. 4, c. 54). Such a marriage was, on the other hand, unimpeachable by the law of New York, and the evidence plainly discloses that it was the definite aim both of Lord George and of his bride to relinquish their domicile of origin and acquire an American domicile of choice before the marriage was celebrated. Whether or not they succeeded in doing so was one of the subjects discussed before me. Whatever be the truth of that matter, however, it was fairly and rightly conceded on behalf of the first two defendants that Lord George and his wife had unquestionably acquired a domicile of choice in New York by the time that their son was born there in June, 1920. From this fact sprang a different way of founding Mr. Wellesley's claim to share in the

testator's estate, and I propose to consider this aspect of the matter first.

The argument on his behalf was briefly as follows: Admitting that only a legitimate child could take under the gift to Nesta Fitzgerald's children, legitimacy is a question of status. That status is conferred or withheld, as the case may be, by the law of the domicile of origin, which is the law of the domicile of the parents at the time when the person whose legitimacy is in question was born. The status, once conferred, remains with the person concerned throughout his or her life and will be recognised and given effect to by our courts, save only in cases where that person claims to succeed to real estate in England. It is established by the evidence that Mr. Wellesley received at birth the status of legitimacy by the law of New York and, accordingly, it was contended, his claim, as a child of his parents, to a fund of English personalty will be recognised by the courts of this country.

There can be no doubt as to the general criterion of a person's legitimacy. 'In most cases', said Lord Brougham in *Fenton* v. *Livingstone* (3 MacQueen 497 at p. 532) 'the legitimacy of a party is to be determined by the law of his birthplace and of his parent's domicile'. Mr. Richard Wellesley undoubtedly received at birth the status of legitimacy from the law of his domicile of origin, and such status is, in general, accorded international recognition. It is said, however, on behalf of the first and second defendants that our courts will not accord universal recognition to a status of legitimacy conferred by a foreign domicile of origin. The acceptance by our law of the status so conferred is, it is contended, subject to exceptions, and the particular exception relied upon in the present case is this, that an English court will not recognise as legitimate the child of a marriage which is incestuous, or which is otherwise contrary to religion or sound morality, notwithstanding that the child is legitimate according to the law of his domicile at birth. In such cases it is said, our courts are not content to act merely upon the fact that the standing of legitimacy was bestowed by the law of the birthplace; they will, on the contrary, fasten their attention upon the marriage of the parents and, finding that incestuous, treat the issue as bastards here, however full the measure of legitimacy that may be conferred upon them in the foreign land of their birth.

So far, at all events, as a court of first instance is concerned, I am of opinion that on the authorities, and especially having regard to the majority judgments in *Re Goodman's Trusts* (17 Ch.D 266), the contentions which were advanced on behalf of Mr. Wellesley . . . must prevail. . . . The conclusion which I

have formed and expressed upon the legitimacy at birth of Mr. Wellesley relieves me of the necessity of inquiring into the domicile of his parents at the time of their marriage in New York.

[Mr. Justice Romer arrived at the above conclusion after reviewing in particular *Re Goodman's Trusts* (17 Ch.D. 266), and *Doe* v. *Vardill*; *Fenton* v. *Livingstone*; *Shaw* v. *Gould* and *Re Andros* (24 Ch.D. 627). In *Re Goodman's Trusts* 'the question arose whether a child born before wedlock of parents who were at her birth domiciled in Holland, but who was legitimated according to the law of Holland by the subsequent marriage of her parents, was or was not entitled to a share in the personal estate of an intestate dying domiciled in England as one of her next-of-kin under the Statute of Distributions. The Court of Appeal held by a majority that she was so entitled. Lord Justice Cotton expressed his view as to the status of legitimacy, and its acquisition, as follows: 'It was urged . . . that the law of England recognises as legitimate those children only who are born in wedlock. This is correct as regards the children of persons who at the time of the children's birth are domiciled in England. But the question as to legitimacy is one of status, and, in my opinion, by the law of England questions of status depend on the law of the domicile. For this proposition there is authority. It is stated by Mr. Justice Story in his book on the *Conflict of Laws*, para. 93, that 'foreign jurists generally, though not universally, maintain that the question of legitimacy or illegitimacy is to be decided exclusively by the law of the domicile of origin', and in paragraph 93[e] he states that 'the same general doctrine is avowedly adopted by the courts of England'. In *Fenton* v. *Livingstone*, Lord Wensleydale expressed himself thus: 'The laws of the State affecting the personal status of the subjects travel with them wherever they go, and attach to them in whatever country they are resident'. Then the Lord Justice addressed himself as follows to the question of recognition by our courts of the status of legitimacy conferred by the law of a foreign State: 'If', he said, 'as in my opinion is the case, the question whether a person is legitimate depends on the law of the place where his parents were domiciled at his birth, that is, on his domicile of origin, I cannot understand on what principle, if he be by that law legitimate, he is not legitimate everywhere, and I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicile . . .'.

Lord Justice James, after propounding the question 'What is

the rule which the English law adopts and applies to a non-English child? ' proceeded to answer it as follows : ' This is a question of international comity and international law. According to that law as recognised, and that comity as practised, in all other civilised communities, the status of a person, his legitimacy or illegitimacy, is to be determined everywhere by the law of the country of his origin—the law under which he was born. It appears to me that it would require a great force of argument derived from legal principles, or great weight of authority clear and distinct, to justify us in holding that our country stands in this respect aloof in barbarous insularity from the rest of the civilised world. On principle, it appears to me that every consideration goes strongly to show, at least, that we ought not so to stand. The family relation is at the botton of all society and it would appear almost an axiom that the family relation, once duly constituted by the law of any civilised country, should be respected and acknowledged by every other member of the great community of nations '.]

BOOK REVIEWS

Oppenheim's International Law, Vol. 1 : 'Peace', Sixth edition, 1947, and Vol. 2 : 'Disputes, War and Neutrality', Sixth edition, revised 1944. Both edited by Prof. H. LAUTERPACHT. [Longmans. liii and 940, and xliv and 766 pp.]

THE appearance of a new edition of the late Professor Oppenheim's standard textbook must always be an event of importance, and this is particularly the case at a period when development in the field of international law has been precipitated by a great war and the upheaval attendant upon it. A sixth edition of the first volume, 'Peace', has now followed the revised sixth edition of the second volume, 'Disputes, War and Neutrality', which was published in 1944. Every practitioner and student will be grateful to Professor Lauterpacht for bringing up to date these two volumes.

The war itself was in the main responsible for the order of publication and for the fact that a new edition of the second volume was more urgently required whilst hostilities were still in progress. The bulk of the new material, however, is contained in the first volume, which is more than a hundred pages longer than the fifth edition. As the learned editor points out in his Preface, he felt obliged, whilst treating of the United Nations, to retain much of the old material on the League of Nations. This should not provoke an apology, however, for most readers will find the comparison between the two international organisations extremely useful. Over against section IX of Chapter 1, Part 1, 'Mandated Areas', is now set section IX A, 'Territories under Trusteeship', so that it is possible to study the two systems together, comparing at pp. 212 and 213 the Mandate Commission of the League and the new Trusteeship Council. Among the many important glosses on the United Nations Charter is paragraph 116*b*, wherein Professor Lauterpacht points out the modification in the conception of the equality of status of States which arises from the special position in the Security Council given to the five great Powers. At the time of writing it was, of course, not apparent how pernicious in practice would be the requirement of unanimity among these Powers.

The nature, object and organisation of the United Nations are very fully treated in a new section on the legal organisation of the International Community, and the reader will find in the footnotes to this section a valuable bibliography on the subject now scattered among so many publications.

The aspirations and ideals of a world sickened of war are reflected in this book, not merely in the articles on the United Nations and its Charter, but in the several new and revised sections dealing with 'International Law and the Rights of Mankind'; 'The Abolition of Statelessness'; 'The Abolition of Forced Labour'; and 'The Rights of Man'. It will be remembered in this connection that Professor Lauterpacht is himself the author of a valuable book on this subject, *An International Bill of the Rights of Man* (1945). Nevertheless, he shows himself well aware of the gulf between ideal and practice which has always been considerable in the realm of international law. Thus at p. 670 he points out that although the Charter provides for 'the encouragement of respect for human rights and for fundamental freedom' it cannot be said that these provisions signify a full and effective guarantee of the inalienable rights of man. Indeed the emphasis in what is new in this edition is as much upon the lessons of the upheaval of the last ten years as it is upon the changes in the form of international organisation brought about by the end of the League and the establishment of the United Nations. Particularly important in this connection are the sections dealing with the modification of neutrality obligations by the United States in the Second World War; with the relaxation in Great Britain of her territorial supremacy which is to be found in the United States of America (Visiting Forces) Act, 1942, and in earlier legislation during the war; and with inter-governmental and inter-departmental agreements.

The increasing tendency of Governments to resort to inter-departmental agreements for the regulation of day-to-day issues between them has been one of the most significant developments in international practice in recent times, and it is to be hoped that in a later edition Professor Lauterpacht will be able to find the space to treat the subject more fully. A paragraph particularly useful at the present time treats of the legal status of Germany since her defeat which the editor pithily sums up in the words 'the international personality of Germany must be deemed to be suspended until the setting up of an independent German Government freely exercising the right to conclude treaties and to maintain diplomatic relations'.

Of the revised sixth edition of Vol. 2, Professor Lauterpacht in his Preface writes: 'I have not attempted to revise the volume systematically section by section by reference to the practice of the belligerents in the course of the second world war. It seems preferable to delay such an undertaking until the available evidence, assessed in the proper perspective, renders the task of revision both complete and reliable'. There is, therefore, not as much new material in this as in the new first volume, although such additions as there are are of great interest. Particularly important, for instance, is the new paragraph 292A (*a*) on the modification of

neutrality during the Second World War which treats in more detail the same subject-matter as paragraph 133*f* of Vol. 1. The learned editor rightly points out that the attitude of the United States prior to its entry into the war was one of qualified neutrality which was inconsistent with the rules of neutrality as they crystallised in the nineteenth century and was a reversion to the attitude of neutrality defined by Grotius. Another important new section is that dealing with the 'Surrender of War Criminals', part of Chapter VI on the 'Means of Securing Legitimate Warfare'. This section was written before the Nuremberg trial and other trials of war criminals began, and it is satisfactory to observe that most of the requirements which Professor Lauterpacht considers necessary for the fair trial of war criminals—publicity, the right of appeal, elimination of summary procedure and the inclusion of lay judges—have been observed in the trials which have actually taken place in the western zones.

An exhaustive account of the modifications in naval, land and aerial warfare made in the war of 1939–45 must necessarily await a later revision of the second volume. But meanwhile, the present edition will remain an indispensable standard book for practitioner and student alike and Professor Lauterpacht is to be congratulated on this most important task of revision and on the numerous additions to Oppenheim's text which he has already so successfully accomplished in both volumes and which bear the mark of his scholarship and great authority.

C. JOHN COLOMBOS.

The Conflict of Laws in Matters of Personal Status in Palestine. By Dr. E. VITTA. [Tel-Aviv : S. Bursi, Ltd. 315 pp.]

THIS book is an original study of private international law and should attract attention outside Palestine amongst all those concerned with the problems of conflicts of law. For in Palestine during the last twenty years conflicts in matters of personal status have been multiplied because of the special character of the rules of law there in force. They have been interpreted by courts presided over by British judges, and many of them are recorded in law reports which are edited by British-trained lawyers so as to be available to British readers. The judgments are examples of a problem which is likely to recur in the new Dominions of India and Pakistan and also in other parts of the British Commonwealth and Empire in which the existing legal system is gradually developed.

In Palestine the British administration maintained the principle of the Ottoman system—derived from the medieval conception of the personal statute—by which each religious community applies its own law and retains its own tribunals for its members. Thus

the courts of the Moslems apply the Shari law, the Rabbinical Tribunals of the Jews the Hebraic and Talmudic law, and the Patriarchal Tribunals for the Greek Orthodox and the Roman Catholics and other Christian communities apply various forms of the Byzantine and the Roman Canon law.

What is new in the Palestine development of the law during the last twenty-five years of British administration is that the English have introduced the rule of law which did not exist in the Ottoman times, that, mainly through Jewish immigration from all countries of Europe, the population has been multi-national, and questions of conflicts between members of different communities are multiplied. An extraordinary number of complicated issues have arisen about marriage, succession and other personal relations. So far as British and foreign subjects are concerned, the general international rule is applied by the civil courts, though the national law of the person is preferred, in accordance with the prevailing rule of Continental countries, and the law of the domicile is adopted only if, as with British subjects, the national law imports it. An acceptance of that limited Renvoi is prescribed by the Palestine Order in Council.

The particular interest of the Palestine jurisprudence arises, however, because the religious courts not only have an exclusive jurisdiction for most matters of personal status of Palestinian citizens, *e.g.*, for marriage relations and confirmation of wills, but also concurrent jurisdiction with the civil courts for other matters, *e.g.*, guardianship and interdiction. The religious courts, too, have concurrent jurisdiction with the civil courts for matters of personal status of foreign subjects if all the parties to the action consent to the application of the religious law. The civil courts again exercise the residue of jurisdiction both for Palestinians who are not members of a community that has its special tribunal, *e.g.*, the Protestant Christians, and for all foreigners who do not agree to refer their disputes to the religious courts. They apply in such cases the national law for foreigners or the religious law for Palestinians.

It will be realised that this complex system of law and courts offers abundant opportunity for conflicts. The British Constitution for Mandated Palestine, laid down in an Order in Council in 1922, which defines the judiciary and the law to be applied, made provision for their solution. A special tribunal, composed of two senior British judges of the Supreme Court and the President of the highest court of the religious community which is alleged by a party to have exclusive jurisdiction in the matter, deals with disputed questions about the jurisdiction of the religious court. The Chief Justice, too, has express authority, when a question of personal status involves members of different religious communities, to decide—with the assistance of assessors from the communities concerned, if he thinks fit—which court shall have jurisdiction.

Dr. Vitta, who is an Italian jurist of repute and a lecturer in this branch of law in the Government Law classes, has made a most thorough examination of the statute law and of the great volume of reported decisions of the Palestine courts—they number many hundreds—which have been decided by the Palestine civil courts during the last twenty-five years, and have been reported in one of the many series of English reports. He has dealt, also, lucidly with the principles involved and is not sparing in criticism of judgments which appear to him to depart from the principles of justice.

It seems amazing that such a volume of authority should be collected in such a short period. But the Palestine lawyer likes the guidance of precedent, and so every small point is duly recorded. Dr. Vitta has mastered the English manner of quoting and commenting on decisions. His work then is a valuable addition to the legal literature in English, not only about the law of Palestine but about private international law. The threatened rupture of the tie between Palestine and the British legal system may bring to an end this notable chapter in the development of English doctrines of conflicts of law. But this book will remain a significant contribution to one aspect of the science, dealing with what may be called inter-religious communal law, which has hitherto had little notice in this country.

NORMAN BENTWICH.

The Control of Alien Property. By MARTIN DOMKE. [New York: Central Book Co. 1947. viii and 334 pp. Supplement to *Trading With the Enemy in World War II.* 1943. xv and 640 pp. Two Vols. $15.00.]

DR. MARTIN DOMKE'S study upon *Trading With the Enemy*, published in New York in 1943, is a singularly lucid and thorough survey both of the relevant legislation, and of the legal effects of enemy character, in the British Empire and Commonwealth and in the United States of America. It is a remarkably well-documented volume taking into its broad sweep, describing and comparing not only the English cases but decisions in the Dominions, the Supreme Court at Washington and the State Courts, and the profusion of academic literature available in the United States. Much material that was difficult to obtain during the war, was made accessible to English readers. It was instructive to compare the definition of 'enemy' in the Trading with the Enemy Act, 1939, with the definition of an 'enemy national' issued by the Treasury Department in General Rubric No. 11 made under Executive Order No. 8389. The term has recently been re-defined (*Supplement*, p. 236). Again, the law of the United States has not accepted the

Daimler doctrine as the criterion of the enemy character of corporations but adopts nationality, or the place of their origin, as the criterion. Administrative regulations, however, have impinged upon this principle (*Supplement*, p. 100). On the other hand, both jurisdictions permit the resident enemy alien to sue : *Schaffenius* v. *Goldberg*, [1916] 1 K.B. 284; *Ex p. Kumazo Kawato* (1942), 317 U.S. 69.

Dr. Domke, in the twenty-one chapters of his work, interprets his subject in the widest sense. His theme is not merely ' trading with the enemy ', but all the connected topics. Of such are : the procedural capacity of an enemy; the status of refugees, internees and prisoners of war; patents, trade-marks and copyrights in time of war; foreign exchange control. His book begins with the enemy character of enemy governments and ends with the administration of national assets by governments in exile. Nothing even remotely relevant is omitted.

The Control of Alien Property—in name and in fact a supplement—is more than half the size of the parent volume. The two books must be taken together : only in the light of the main work are the references in the supplement intelligible. The *Supplement* is a terse commentary upon the text, bringing up to date the cases, statutes, rules and orders, academic references and the English, Dominion and American bibliography. About 200 new titles are added, including *Notes* on learned periodicals, often more illuminating than articles. Reference is made to the Treaty of Peace with Italy, in particular to the clauses relating to Reparation, Restitution, and effect of war on contracts. Dr. Domke's industry is indefatigable : even the *Supplement* is not the end but leads into forty pages of *Addenda*. Thus the *Supplement* is more in the nature of a recent source book or apparatus of references than a piece of exposition. This is inevitable and was, no doubt, Dr. Domke's object; having chosen to be comprehensive rather than eclectic, he must be congratulated upon the manifest care and accuracy with which he has assembled under conditions which are constantly changing, such a vast and diverse array of judicial, legislative and academic learning.

The control of enemy property has not passed with the cessation of hostilities; only one phase has passed : the emphasis has changed. Indeed, both in domestic and in international relations the subject assumes a greater importance. The disposition of enemy assets in the countries of the United Nations will take many years to be completed. A Treaty of Peace is not so much the conclusion as a new beginning : it settles principles, not problems; the details are only finally worked out by later political agreements or the quasi-judicial determination of arbitral tribunals. In the settlement of these problems the amplitude of material displayed by Dr. Domke will prove of value.

When the time arrives for a second supplement to *Trading with*

the Enemy, we hope Dr. Domke will be enabled instead to incorporate his material in a second edition.

GEORGE J. WEBBER.

Características essenciais do novo direito internacional. By ILMAR PENNA MARINHO. [Rio de Janeiro. 1947. 475 pp.]

THE first part of this book gives the views of the author on the modern tendencies of evolution of international law, while the second (pp. 267–475) contains the texts of the more important international documents which came into existence between 1941 (the Atlantic Charter) and the end of 1945 (Unesco).

According to the author, the main characteristics of the new international law are the following. 'The notion of aggressive sovereign State is superseded by the notion of interdependent State' for which international co-operation should be above 'nationalistic whims'. All States in the new world (*um cosmos novo*) have 'juridical equality', but that equality must be claimed with sense of reality as in fact there are small and big, weak and strong States (p. 26). In these States the new International Law 'cannot accept the existence of anti-democratic regimes' (p. 35). The democratisation of regimes should not, however, be effected by force, but by persuasion, education and diplomatic means (p. 39). The new international law has to deal not only with juridical and political relations between States, but also—more and more—with problems arising out of economic, social, educational, and cultural intercourse (p. 45). These complex problems, especially the economic, cannot be satisfactorily dealt with by bilateral treaties. Multilateral treaties and creation of international organisations will be required for that (p. 46). International co-operation in all fields of human activity is indispensable and is growing. In particular, education is of the greatest importance as a means of creating, *inter alia*, a 'universal juridical conscience', the real basis for international law (p. 74). International organisation for collective security is indispensable. Most important are international consultations of States in conferences similar to those of South American States (Chap. xi). 'The international law of tomorrow will finally accept the doctrine that the individual is a beneficiary of the rules of the law of nations' (p. 181). 'Today the individual is a subject of international law, not by favour, by exception, or—as some writers claim—a subject *sui generis*, but . . . a subject of international law in the full meaning of the word' (p. 200). The Atlantic Charter and the Declaration of the United Nations give the individual 'the position of the paramount (primordial) subject of the Law of Nations' (p. 189).

Though I appreciate the importance of the Atlantic Charter for the recognition of the status of the individual in international law

(see my paper in *The Transactions of the Grotius Society*, Vol. 30, Part 1, p. 65), I think that the author's views above given overstate the case. Sgr. Marinho, though full of faith in and of enthusiasm for the new international law is not content with many of the provisions of the Charter of UNO and is apprehensive of certain trends in the foreign policy of some nations. This apprehension goes so far that he sees the world 'on the brink of a conflagration' as in 1938 (p. 259). All depends now, in his view, 'on the manner in which the Anglo-Saxons will react to the expansionist policy of the U.S.S.R.' (258–259). Such 'conflagration'—were it to occur—would probably prove the end of the present human society. It is to be hoped that the gloomy possibilities seen by the author will not materialise. The 'universal juridical conscience' of which he eloquently speaks should grow and bring about the penetration of the notion of right in this world of force. Sgr. Marinho's views on the 'new international law' expressed in his stimulating book are of great interest and importance to those who believe that right should come before might.

Vladimir Idelson.

A Imunidade De Jurisdição Penal Das Familias De Diplomatas. By Geraldo Eulalio Do Nascimento E. Silva. Rio de Janeiro: Imprensa Nacional. 1946.]

This booklet is a reprint of a valuable contribution by Dr. Nascimento E. Silva on the immunity from penal jurisdiction of the families of diplomats published in Journal (No. 2) of the Brazilian Society of International Law.

The author begins by drawing the reader's attention to the fact that while it was always recognised that ambassadors were only subject to the authority of the sovereigns they represented, the question of the extension of their immunities to their families only arose in the sixteenth and seventeenth centuries with the establishment of permanent missions. Even at that time, the fact of a woman accompanying her husband was very badly viewed and in 1639 when the Spanish Ambassador to the United Provinces was accompanied by his wife, the French envoy declared with some justifiable irony, 'this involved dealing with a hermaphrodite delegation'.

After discussing the opinions of various writers as to the origins and reasons for the extension of immunity to the wives and families of diplomats, Dr. Silva comes to the conclusion that practically the predominating factor is the necessity of surrounding a diplomat with certain guarantees so that he may exercise his functions freely and without embarrassment from local authorities. If these could infringe at any moment upon the inviolability of his family this

ipso facto would limit his freedom of action. A distinction, however, must be drawn between the wife and other members of a diplomat's family. No doubt exists, says the author, as to the wives of Ambassadors or other official personnel of the mission sharing in the immunity granted to their husbands, and this is so even though the wife is not living 'under the same roof' as her husband (see *Diplomatic Immunities*, by Sir Cecil Hurst, Recueil of the Academy of Int. Law, Hague, 1926, Vol. 12, p. 158, citing decisions of French and English courts). As regards children and other relatives, there is the qualification that they should 'live under his roof' so that the son of a diplomat independently established in the foreign country would not enjoy extra-territoriality. The same would apply to a married daughter or other relative not living with the diplomat and dependent on him. The author contends, we think rightly, that the expression 'who live under the same roof' should not be construed too narrowly although as he points out, Art. 14 of the Havana Convention only recognises the inviolability of members of families who 'live under the same roof' as the diplomat; whereas the code Bustamente, Art. 298 expresses it as 'who live in his company'. Generally it may be said that nowadays exemption from criminal jurisdiction of such members of a diplomat's family as 'live in fact' with him is almost invariably granted. The author notes, however, that in accordance with the Soviet law of June 30, 1921, diplomatic immunities granted to families of diplomats only apply to children under sixteen years.

Dr. Silva then proceeds to examine the question as to whether an envoy has the right to renounce the immunity of members of his family without first obtaining the consent of his own government, and points out that while there is disagreement and many theories on this point, the general rule is that an envoy may waive the immunity of his wife or family without the consent of the home State. *Herman* v. *Apetz* (*Annual Digest*, 1927–1928, Case No. 244); *Carlos Waddington* R.G. 14 (1907). The author rightly emphasises that the immunity granted to a diplomat and his family does not imply exemption from punishment, but merely that the territorial law normally competent to try and punish all crimes is substituted for an ex-territorial law, namely, that of the country which the diplomat represents.

Though immune from local justice, diplomats and their families should obviously not abuse their privileges. On the contrary, all local police and other regulations and laws should be most scrupulously observed and those disobeying them may either be admonished by the envoy, recalled by their Home State, or their withdrawal requested. (*The Elkton Incident*, *American Journal of Int. Law*, Vol. 30 (1936), p. 96.)

Dr. Silva finally deals with the various attempts at both State and international codification of the problem of judicial immunity

and refers particularly to the efforts made in the American Continent to produce some uniformity, *e.g.*, the Pan-American Conferences of 1901–1928 as well as the work of the League of Nations's sub-commission set up for this purpose. But though undoubtedly much valuable work has been done in this field by individual States and jurists, such as the author of this treatise, in ascertaining the differences existing between the customary practice of States as well as in clarifying their own internal practices and laws, it is the opinion at least of this reviewer that no great process of clarification, co-ordination or codification can be anticipated until this problem, like that of the codification of international law in general, is taken in hand on an international basis by some such authoritative body as the United Nations International Law Commission.

H. C. McCarthy.

SELECTED OFFICIAL DOCUMENTS

THE following documents are printed in the present issue:

1. Trusteeship Agreement for Tanganyika under United Kingdom Administration, December, 1946. (Cmd. 7081.)
2. Treaty of Alliance and Mutual Assistance between the United Kingdom and France, March, 1947. (Cmd. 7058.)
3. Convention between the United Kingdom and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on the Estates of Deceased Persons, April, 1945. (Cmd. 6890.)
4. Convention between the United Kingdom and the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, April, 1945. (Cmd. 6902.)
5. Exchange of Notes between the United Kingdom and Syria concerning the Settlement of Pending Cases before the Syrian Mixed Courts, November, 1946. (Cmd. 7140.)
6. Exchange of Notes between the United Kingdom and France for the Settlement of Differences regarding the Application of French Nationality to British Subjects in Tunisia, February, 1947. (Cmd. 7117.)

On December 13, 1946, the General Assembly of the United Nations approved the texts of several Trusteeship Agreements.[1] The text submitted by the United Kingdom for Tanganyika is included as an example. It should be noted, however, that while these agreements are founded on the same principles in the Charter of the United Nations, they differ from one another both in form and substance.

The Treaty of Alliance between the United Kingdom and France is mainly of political interest, but the references to the United Nations Charter are also of interest from the legal point of view.

The Double Taxation Agreements with the United States should be known to every practising lawyer. Agreements of this type are likely to become of increasing importance and a practitioner would

[1] *United Kingdom Administration*: Tanganyika (Cmd. 7081); Togoland (Western) (Cmd. 7083); Cameroons (Western) (Cmd. 7082). *French Administration*: Togoland (Eastern) (Cmd. 7199); Cameroons (Eastern) (Cmd. 7198). *Australian Administration*: New Guinea (Cmd. 7200). *New Zealand Administration*: Western Samoa (Cmd. 7197).

be well-advised to inquire as to whether there is a relevant agreement whenever he is confronted with a problem of double taxation of the same income or estate or of tax evasion by improper use of tax reliefs in the United Kingdom and another country.

The exchanges of notes with Syria and with France are included because they may be of some interest to students of the conflict of laws. The Syrian answer to the United Kingdom note is printed in full because it is not in the usual form; but the French reply is omitted because, according to the usual practice, it simply repeats the text of the United Kingdom note.

1

TANGANYIKA

TEXT OF TRUSTEESHIP AGREEMENT AS APPROVED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS.

New York, December 13, 1946

Whereas the Territory known as Tanganyika has been administered in accordance with Article 22 of the Covenant of the League of Nations under a Mandate conferred on His Britannic Majesty; and

Whereas Article 75 of the United Nations Charter signed at San Francisco on June 26, 1945,[1] provides for the establishment of an international trusteeship system for the administration and supervision of such territories as may be placed thereunder by subsequent individual agreements; and

Whereas under Article 77 of the said Charter the international trusteeship system may be applied to territories now held under Mandate; and

Whereas His Majesty has indicated his desire to place Tanganyika under the said international trusteeship system; and

Whereas in accordance with Articles 75 and 77 of the said Charter, the placing of a territory under the international trusteeship system is to be effected by means of a Trusteeship Agreement;

Now, therefore, the General Assembly of the United Nations hereby resolves to approve the following terms of trusteeship for Tanganyika :—

Article 1

The Territory to which this Agreement applies comprises that part of East Africa lying within the boundaries defined by Article 1 of the British Mandate for East Africa, and by the Anglo-Belgian

[1] ' Treaty Series No. 67 (1946) ', Cmd. 7015.

Treaty of November 22, 1934,[2] regarding the boundary between Tanganyika and Ruanda-Urundi.

ARTICLE 2

His Majesty is hereby designated as Administering Authority for Tanganyika, the responsibility for the administration of which will be undertaken by His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 3

The Administering Authority undertakes to administer Tanganyika in such a manner as to achieve the basic objectives of the international trusteeship system laid down in Article 76 of the United Nations Charter. The Administering Authority further undertakes to collaborate fully with the General Assembly of the United Nations and the Trusteeship Council in the discharge of all their functions as defined in Article 87 of the United Nations Charter, and to facilitate any periodic visits to Tanganyika which they may deem necessary, at times to be agreed upon with the Administering Authority.

ARTICLE 4

The Administering Authority shall be responsible (a) for the peace, order, good government and defence of Tanganyika and (b) for ensuring that it shall play its part in the maintenance of international peace and security.

ARTICLE 5

For the above-mentioned purposes and for all purposes of this Agreement, as may be necessary, the Administering Authority :

(a) shall have full powers of legislation, administration, and jurisdiction in Tanganyika, subject to the provisions of the United Nations Charter and of this Agreement;

(b) shall be entitled to constitute Tanganyika into a customs, fiscal or administrative union or federation with adjacent territories under his sovereignty or control, and to establish common services between such territories and Tanganyika where such measures are not inconsistent with the basic objectives of the international trusteeship system and with the terms of this Agreement;

(c) and shall be entitled to establish naval, military and air bases, to erect fortifications, to station and employ his own forces in Tanganyika and to take all such other measures as are in his opinion necessary for the defence of Tanganyika and for ensuring that the Territory plays its part in the maintenance of international peace and security. To this end the Administering Authority may

[2] 'Treaty Series No 41 (1938)', Cmd. 5777.

make use of volunteer forces, facilities and assistance from Tanganyika in carrying out the obligations towards the Security Council undertaken in this regard by the Administering Authority, as well as for local defence and the maintenance of law and order within Tanganyika.

Article 6

The Administering Authority shall promote the development of free political institutions suited to Tanganyika. To this end, the Administering Authority shall assure to the inhabitants of Tanganyika a progressively increasing share in the administrative and other services of the Territory; shall develop the participation of the inhabitants of Tanganyika in advisory and legislative bodies and in the government of the Territory, both central and local, as may be appropriate to the particular circumstances of the Territory and its peoples; and shall take all other appropriate measures with a view to the political advancement of the inhabitants of Tanganyika in accordance with Article 76 (b) of the United Nations Charter.

Article 7

The Administering Authority undertakes to apply in Tanganyika the provisions of any international conventions and recommendations already existing or hereafter drawn up by the United Nations or by the specialised agencies referred to in Article 57 of the Charter, which may be appropriate to the particular circumstances of the Territory and which would conduce to the achievement of the basic objectives of the international trusteeship system.

Article 8

In framing laws relating to the holding or transfer of land and natural resources, the Administering Authority shall take into consideration native laws and customs, and shall respect the rights and safeguard the interests, both present and future, of the native population. No native land or natural resources may be transferred, except between natives, save with the previous consent of the competent public authority. No real rights over native land or natural resources in favour of non-natives may be created except with the same consent.

Article 9

Subject to the provisions of Article 10 of this Agreement, the Administering Authority shall take all necessary steps to ensure equal treatment in social, economic, industrial and commercial matters for all Members of the United Nations and their nationals and to this end :

(a) shall ensure the same rights to all nationals of Members of

the United Nations as to his own nationals in respect of entry into and residence in Tanganyika, freedom of transit and navigation, including freedom of transit and navigation by air, acquisition of property both movable and immovable, the protection of persons and property, and the exercise of professions and trades;

(b) shall not discriminate on grounds of nationality against nationals of any Member of the United Nations in matters relating to the grant of concessions for the development of the natural resources of Tanganyika, and shall not grant concessions having the character of a general monopoly;

(c) shall ensure equal treatment in the administration of justice to the nationals of all Members of the United Nations.

The rights conferred by this Article on nationals of Members of the United Nations apply equally to companies and associations controlled by such nationals and organised in accordance with the law of any Member of the United Nations.

ARTICLE 10

Measures taken to give effect to Article 9 of this Agreement shall be subject always to the over-riding duty of the Administering Authority in accordance with Article 76 of the United Nations Charter to promote the political, economic, social and educational advancement of the inhabitants of Tanganyika, to carry out the other basic objectives of the international trusteeship system, and to maintain peace, order and good government. The Administering Authority shall in particular be free:

(a) to organise essential public services and works on such terms and conditions as he thinks just;

(b) to create monopolies of a purely fiscal character in order to provide Tanganyika with the fiscal resources which seem best suited to local requirements, or otherwise to serve the interests of the inhabitants of Tanganyika;

(c) where the interests of the economic advancement of the inhabitants of Tanganyika may require it, to establish or permit to be established, for specific purposes, other monopolies or undertakings having in them an element of monopoly, under conditions of proper public control; provided that, in the selection of agencies to carry out the purposes of this paragraph, other than agencies controlled by the Government or those in which the Government participates, the Administering Authority shall not discriminate on grounds of nationality against Members of the United Nations or their nationals.

Article 11

Nothing in this Agreement shall entitle any Member of the United Nations to claim for itself or for its nationals, companies and associations the benefits of Article 9 of this Agreement in any respect in which it does not give to the inhabitants, companies and associations of Tanganyika equality of treatment with the nationals, companies and associations of the State which it treats most favourably.

Article 12

The Administering Authority shall, as may be appropriate to the circumstances of Tanganyika, continue and extend a general system of elementary education designed to abolish illiteracy and to facilitate the vocational and cultural advancement of the population, child and adult, and shall similarly provide such facilities as may prove desirable and practicable in the interests of the inhabitants for qualified students to receive secondary and higher education, including professional training.

Article 13

The Administering Authority shall ensure in Tanganyika complete freedom of conscience and, so far as is consistent with the requirements of public order and morality, freedom of religious teaching and the free exercise of all forms of worship. Subject to the provisions of Article 8 of this Agreement and the local law, missionaries who are nationals of Members of the United Nations shall be free to enter Tanganyika and to travel and reside therein, to acquire and possess property, to erect religious buildings and to open schools and hospitals in the Territory. The provisions of this Article shall not, however, affect the right and duty of the Administering Authority to exercise such controls as he may consider necessary for the maintenance of peace, order and good government and for the educational advancement of the inhabitants of Tanganyika, and to take all measures required for such control.

Article 14

Subject only to the requirements of public order, the Administering Authority shall guarantee to the inhabitants of Tanganyika freedom of speech, of the press, of assembly, and of petition.

Article 15

The Administering Authority may arrange for the co-operation of Tanganyika, in any regional advisory commission, regional technical organisation or other voluntary association of States, any specialised international bodies, public or private, or other forms of international activity not inconsistent with the United Nations Charter.

ARTICLE 16

The Administering Authority shall make to the General Assembly of the United Nations an annual report on the basis of a questionnaire drawn up by the Trusteeship Council in accordance with Article 88 of the United Nations Charter. Such reports shall include information concerning the measures taken to give effect to suggestions and recommendations of the General Assembly and the Trusteeship Council. The Administering Authority shall designate an accredited representative to be present at the sessions of the Trusteeship Council at which the reports of the Administering Authority with regard to Tanganyika are considered.

ARTICLE 17

Nothing in this Agreement shall affect the right of the Administering Authority to propose, at any future date, the amendment of this Agreement for the purpose of designating the whole or part of Tanganyika as a strategic area or for any other purpose not inconsistent with the basic objectives of the international trusteeship system.

ARTICLE 18

The terms of this Agreement shall not be altered or amended except as provided in Article 79 and Articles 83 or 85, as the case may be, of the United Nations Charter.

ARTICLE 19

If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice provided for in Chapter XIV of the United Nations Charter.

2

TREATY OF ALLIANCE AND MUTUAL ASSISTANCE BETWEEN HIS MAJESTY IN RESPECT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE PRESIDENT OF THE FRENCH REPUBLIC.

Dunkirk, March 4, 1947

His Majesty The King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and

The President of the French Republic,

Desiring to confirm in a Treaty of Alliance the cordial friendship and close association of interests between the United Kingdom and France;

Convinced that the conclusion of such a Treaty will facilitate the settlement in a spirit of mutual understanding of all questions arising between the two countries;

Resolved to co-operate closely with one another as well as with the other United Nations in preserving peace and resisting aggression, in accordance with the Charter of the United Nations [1] and in particular with Articles 49, 51, 52, 53 and 107 thereof;

Determined to collaborate in measures of mutual assistance in the event of any renewal of German aggression, while considering most desirable the conclusion of a treaty between all the Powers having responsibility for action in relation to Germany with the object of preventing Germany from becoming again a menace to peace;

Having regard to the Treaties of Alliance and Mutual Assistance which they have respectively concluded with the Union of Soviet Socialist Republics [2];

Intending to strengthen the economic relations between the two countries to their mutual advantage and in the interests of general prosperity; have agreed as follows :—

Article 1

Without prejudice to any arrangements that may be made, under any Treaty concluded between all the Powers having responsibility for action in relation to Germany under Article 107 of the Charter of the United Nations, for the purpose of preventing any infringements by Germany of her obligations with regard to disarmament and de-militarisation and generally of ensuring that Germany shall not again become a menace to peace, the High Contracting Parties will, in the event of any threat to the security of either of them arising from the adoption by Germany of a policy of aggression or from action by Germany designed to facilitate such a policy, take, after consulting with each other and where appropriate with the other Powers having responsibility for action in relation to Germany, such agreed action (which so long as the said Article 107 remains operative shall be action under that Article) as is best calculated to put an end to this threat.

Article 2

Should either of the High Contracting Parties become again involved in hostilities with Germany,

either in consequence of an armed attack, within the meaning of Article 51 of the Charter of the United Nations, by Germany against that Party,

or as a result of agreed action taken against Germany under Article 1 of this Treaty,

[1] ' Treaty Series No. 67 (1946) ', Cmd. 7015.
[2] ' Treaty Series No. 2 (1942) ', Cmd. 6376 (Anglo-Soviet Treaty).

or as a result of enforcement action taken against Germany by the United Nations Security Council,

the other High Contracting Party will at once give the High Contracting Party so involved in hostilities all the military and other support and assistance in his power.

ARTICLE 3

In the event of either High Contracting Party being prejudiced by the failure of Germany to fulfil any obligation of an economic character imposed on her as a result of the Instrument of Surrender or arising out of any subsequent settlement, the High Contracting Parties will consult with each other and where appropriate with the other Powers having responsibility for action in relation to Germany, with a view to taking agreed action to deal with the situation.

ARTICLE 4

Bearing in mind the interests of the other members of the United Nations, the High Contracting Parties will by constant consultation on matters affecting their economic relations with each other take all possible steps to promote the prosperity and economic security of both countries and thus enable each of them to contribute more effectively to the economic and social objectives of the United Nations.

ARTICLE 5

(1) Nothing in the present Treaty should be interpreted as derogating in any way from the obligations devolving upon the High Contracting Parties from the provisions of the Charter of the United Nations or from any special agreements concluded in virtue of Article 43 of the Charter.

(2) Neither of the High Contracting Parties will conclude any alliance or take part in any coalition directed against the other High Contracting Parties; nor will they enter into any obligation inconsistent with the provisions of the present Treaty.

ARTICLE 6

(1) The present Treaty is subject to ratification and the instruments of ratification will be exchanged in London as soon as possible.

(2) It will come into force immediately on the exchange of the instruments of ratification and will remain in force for a period of fifty years.

(3) Unless either of the High Contracting Parties gives to the other notice in writing to terminate it at least one year before the expiration of this period, it will remain in force without any specified time limit, subject to the right of either of the High

Contracting Parties to terminate it by giving to the other in writing a year's notice of his intention to do so.

In witness whereof the above-mentioned Plenipotentiaries have signed the present Treaty and affixed thereto their seals.

Done in Dunkirk the fourth day of March, 1947, in duplicate in English and French, both texts being equally authentic.

(L.S.) ERNEST BEVIN. (L.S.) BIDAULT.
(L.S.) DUFF COOPER. (L.S.) R. MASSIGLI.

3

CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON THE ESTATES OF DECEASED PERSONS.

Washington, April 16, 1945

Article 1

(1) The taxes which are the subject of the present Convention are:

(a) In the United States of America, the Federal estate tax, and

(b) In the United Kingdom of Great Britain and Northern Ireland, the estate duty imposed in Great Britain.

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the Government of any territory to which the present Convention applies under Article 8 or 9.

Article 2

(1) In the present Convention, unless the context otherwise requires:

(a) The term 'United States' means the United States of America, and when used in a geographical sense means the States, the Territories of Alaska and of Hawaii, and the District of Columbia.

(b) The term 'Great Britain' means England, Wales and Scotland, and does not include the Channel Islands or the Isle of Man.

(c) The term 'territory' when used in relation to one or the other Contracting Party means Great Britain or the United States, as the context requires.

(d) The term 'tax' means the estate duty imposed in Great Britain or the United States Federal estate tax, as the context requires.

(2) In the application of the provisions of the present Convention by one of the Contracting Parties, any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

ARTICLE 3

(1) For the purposes of the present Convention, the question whether a decedent was domiciled in any part of the territory of one of the Contracting Parties at the time of his death shall be determined in accordance with the law in force in that territory.

(2) Where a person dies domiciled in any part of the territory of one Contracting Party, the situs of any of the following rights or interests, legal or equitable, which for the purposes of tax form part of the estate of such person or pass on his death, shall, for the purposes of the imposition of tax and for the purposes of the credit to be allowed under Article 5, be determined exclusively in accordance with the following rules, but in cases not within such rules the situs of such rights and interests shall be determined for those purposes in accordance with the law relating to tax in force in the territory of the other Contracting Party:—

(a) Rights or interests (otherwise than by way of security) in or over immovable property shall be deemed to be situated at the place where such property is located;

(b) Rights or interests (otherwise than by way of security) in or over tangible movable property, other than such property for which specific provision is hereinafter made, and in or over bank or currency notes, other forms of currency recognised as legal tender in the place of issue, negotiable bills of exchange and negotiable promissory notes, shall be deemed to be situated at the place where such property, notes, currency or documents are located at the time of death, or, if *in transitu*, at the place of destination;

(c) Debts, secured or unsecured, other than the forms of indebtedness for which specific provision is made herein, shall be deemed to be situated at the place where the decedent was domiciled at the time of death;

(d) Shares or stock in a corporation other than a municipal or governmental corporation (including shares or stock held by a nominee where the beneficial ownership is evidenced by scrip certificates or otherwise) shall be deemed to be situated at the place in or under the laws of which such corporation was created or organised;

(e) Monies payable under a policy of assurance or insurance on the life of the decedent shall be deemed to be situated at

the place where the decedent was domiciled at the time of death;

(f) Ships and aircraft and shares thereof shall be deemed to be situated at the place of registration or documentation of the ship or aircraft;

(g) Goodwill as a trade, business or professional asset shall be deemed to be situated at the place where the trade, business or profession to which it pertains is carried on;

(h) Patents, trade marks and designs shall be deemed to be situated at the place where they are registered;

(i) Copyright, franchises, and rights or licences to use any copyrighted material, patent, trade mark or design shall be deemed to be situated at the place where the rights arising therefrom are exercisable;

(j) Rights or causes of action *ex delicto* surviving for the benefit of an estate of a decedent shall be deemed to be situated at the place where such rights or causes of action arose;

(k) Judgment debts shall be deemed to be situated at the place where the judgment is recorded;

Provided that if, apart from this paragraph, tax would be imposed by one Contracting Party on any property which is situated in its territory and passes under a disposition not governed by its law, this paragraph shall not apply to such property unless, by reason of its application or otherwise, tax is imposed or would but for some specific exemption be imposed thereon by the other Contracting Party.

Article 4

(1) In determining the amount on which tax is to be computed, permitted deductions shall be allowed in accordance with the law in force in the territory in which the tax is imposed.

(2) Where tax is imposed by one Contracting Party on the death of a person who at the time of his death was not domiciled in any part of the territory of that Contracting Party but was domiciled in some part of the territory of the other Contracting Party, no account shall be taken in determining the amount or rate of such tax of property situated outside the former territory: Provided that this paragraph shall not apply as respects tax imposed—

(a) in the United States in the case of a United States citizen dying domiciled in any part of Great Britain; or

(b) in Great Britain in the case of property passing under a disposition governed by the law of Great Britain.

Article 5

(1) Where one Contracting Party imposes tax by reason of a decedent's being domiciled in some part of its territory or being its national, that Party shall allow against so much of its tax (as otherwise computed) as is attributable to property situated in the

territory of the other Contracting Party, a credit (not exceeding the amount of the tax so attributable) equal to so much of the tax imposed in the territory of such other Party as is attributable to such property; but this paragraph shall not apply as respects any such property as is mentioned in paragraph (2) of this Article.

(2) Where each Contracting Party imposes tax by reason of a decedent's being domiciled in some part of its territory, each Party shall allow against so much of its tax (as otherwise computed) as is attributable to property which is situated, or is deemed under paragraph (2) of Article 3 to be situated,

(a) in the territory of both Parties, or

(b) outside both territories,

a credit which bears the same proportion to the amount of its tax so attributable or to the amount of the other Party's tax attributable to the same property, whichever is the less, as the former amount bears to the sum of both amounts.

(3) For the purposes of this Article, the amount of the tax of a Contracting Party attributable to any property shall be ascertained after taking into account any credit, allowance or relief, or any remission or reduction of tax, otherwise than in respect of tax payable in the territory of the other Contracting Party or in any other country; and if, in respect of property situated outside the territories of both Parties, a Contracting Party allows against its tax a credit for tax payable in the country where the property is situated, that credit shall be taken into account in ascertaining, for the purposes of paragraph (2) of this Article, the amount of the tax of that Party attributable to the property.

ARTICLE 6

(1) Any claim for a credit or for a refund of tax founded on the provisions of the present Convention shall be made within six years from the date of the death of the decedent in respect of whose estate the claim is made, or, in the case of a reversionary interest where payment of tax is deferred until on or after the date on which the interest falls into possession, within six years from that date.

(2) Any such refund shall be made without payment of interest on the amount so refunded.

ARTICLE 7

(1) The taxation authorities of the Contracting Parties shall exchange such information (being information available under the respective taxation laws of the Contracting Parties) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any person other than

those concerned with the assessment and collection of the taxes which are the subject of the present Convention. No information shall be exchanged which would disclose any trade secret or trade process.

(2) As used in this Article, the term 'taxation authorities' means, in the case of the United States, the Commissioner of Internal Revenue or his authorised representative; in the case of Great Britain, the Commissioners of Inland Revenue or their authorised representative; and, in the case of any territory to which the present Convention is extended under Article 8, the competent authority for the administration in such territory of the taxes to which the present Convention applies.

Article 8

(1) Either of the Contracting Parties may, on the coming into force of the present Convention or at any time thereafter while it continues in force, by a written notification of extension given to the other Contracting Party through diplomatic channels, declare its desire that the operation of the present Convention shall extend to all or any of its colonies, overseas territories, protectorates, or territories in respect of which it exercises a mandate, which impose taxes substantially similar in character to those which are the subject of the present Convention. The present Convention shall apply to the territory or territories named in such notification as to the estates of persons dying on or after the date or dates specified in the notification (not being less than sixty days from the date of the notification) or, if no date is specified in respect of any such territory, on or after the sixtieth day after the date of such notification, unless, prior to the date on which the Convention would otherwise become applicable to a particular territory, the Contracting Party to whom notification is given shall have informed the other Contracting Party in writing through diplomatic channels that it does not accept such notification as to that territory. In the absence of such extension, the present Convention shall not apply to any such territory.

(2) At any time after the expiration of one year from the entry into force of an extension under paragraph (1) of this Article, either of the Contracting Parties may, by written notice of termination given to the other Contracting Party through diplomatic channels, terminate the application of the present Convention to any territory to which it has been extended under paragraph (1), and in such event the present Convention shall cease to apply, as to the estates of persons dying on or after the date or dates (not being earlier than the sixtieth day after the date of such notice) specified in such notice, or, if no date is specified, on or after the sixtieth day after the date of such notice, to the territory or territories named therein, but without affecting its continued application to Great

Britain, the United States or to any other territory to which it has been extended under paragraph (1) hereof.

(3) In the application of the present Convention in relation to any territory to which it is extended by the United Kingdom or the United States, references to 'Great Britain' or, as the case may be, 'United States', or to the territory of one (or the other) Contracting Party, shall be construed as references to that territory.

(4) The provisions of the preceding paragraphs of this Article shall apply to the Channel Islands and the Isle of Man as if they were colonies of the United Kingdom.

ARTICLE 9

The present Convention shall apply in relation to the estate duty imposed in Northern Ireland as it applies in relation to the estate duty imposed in Great Britain, but shall be separately terminable in respect of Northern Ireland by the same procedure as is laid down in paragraph (2) of Article 8.

ARTICLE 10

(1) The present Convention shall be ratified and the instruments of ratification shall be exchanged at Washington as soon as possible.

(2) The present Convention shall come into force on the date of exchange of ratifications and shall be effective only as to—

(a) the estates of persons dying on or after such date; and

(b) the estate of any person dying before such date and after the 31st day of December, 1944, whose personal representative elects, in such manner as may be prescribed, that the provisions of the present Convention shall be applied to such estate.

ARTICLE 11

(1) The present Convention shall remain in force for not less than three years after the date of its coming into force.

(2) If not less than six months before the expiration of such period of three years, neither of the Contracting Parties shall have given to the other Contracting Party, through diplomatic channels, written notice of its intention to terminate the present Convention, the Convention shall remain in force after such period of three years until either of the Contracting Parties shall have given written notice of such intention, in which event the present Convention shall not be effective as to the estates of persons dying on or after the date (not being earlier than the sixtieth day after the date of such notice) specified in such notice, or, if no date is specified, on or after the sixtieth day after the date of such notice.

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CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME.

Washington, April 16, 1945

Article 1

(1) The taxes which are the subject of the present Convention are :—

(a) In the United States of America :

The Federal income taxes, including surtaxes and excess profits taxes (hereinafter referred to as United States tax).

(b) In the United Kingdom of Great Britain and Northern Ireland :

The income tax (including surtax), the excess profits tax and the national defence contribution (hereinafter referred to as United Kingdom tax).

(2) The present Convention shall also apply to any other taxes of a substantially similar character imposed by either Contracting Party subsequently to the date of signature of the present Convention or by the Government of any territory to which the present Convention is extended under Article 22.

Article 2

(1) In the present Convention, unless the context otherwise requires—

(a) The term ' United States ' means the United States of America, and when used in a geographical sense means the States, the Territories of Alaska and of Hawaii, and the District of Columbia.

(b) The term ' United Kingdom ' means Great Britain and Northern Ireland, excluding the Channel Islands and the Isle of Man.

(c) The terms ' territory of one of the Contracting Parties ' and ' territory of the other Contracting Party ' mean the United States or the United Kingdom as the context requires.

(d) The term ' United States corporation ' means a corporation, association or other like entity created or organised in or under the laws of the United States.

(e) The term ' United Kingdom corporation ' means any kind

of juridical person created under the laws of the United Kingdom.

(f) The terms ' corporation of one Contracting Party ' and ' corporation of the other Contracting Party ' mean a United States corporation or a United Kingdom corporation as the context requires.

(g) The term ' resident of the United Kingdom ' means any person (other than a citizen of the United States or a United States corporation) who is resident in the United Kingdom for the purposes of United Kingdom tax and not resident in the United States for the purposes of United States tax. A corporation is to be regarded as resident in the United Kingdom if its business is managed and controlled in the United Kingdom.

(h) The term ' resident of the United States ' means any individual who is resident in the United States for the purposes of United States tax and not resident in the United Kingdom for the purposes of United Kingdom tax, and any United States corporation and any partnership created or organised in or under the laws of the United States, being a corporation or partnership which is not resident in the United Kingdom for the purposes of United Kingdom tax.

(i) The term ' United Kingdom enterprise ' means an industrial or commercial enterprise or undertaking carried on by a resident of the United Kingdom.

(j) The term ' United States enterprise ' means an industrial or commercial enterprise or undertaking carried on by a resident of the United States.

(k) The terms ' enterprise of one of the Contracting Parties ' and ' enterprise of the other Contracting Party ' mean a United States enterprise or a United Kingdom enterprise, as the context requires.

(l) The term ' permanent establishment ' when used with respect to an enterprise of one of the Contracting Parties means a branch, management, factory or other fixed place of business, but does not include an agency unless the agent has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of such enterprise or has a stock of merchandise from which he regularly fills orders on its behalf. An enterprise of one of the Contracting Parties shall not be deemed to have a permanent establishment in the territory of the other Contracting Party merely because it carries on business dealings in the territory of such other Contracting Party through a bona fide commission agent, broker or custodian acting in the ordinary course of his business as such. The fact that an enterprise of one of the Contracting Parties maintains in the territory

of the other Contracting Party a fixed place of business exclusively for the purchase of goods or merchandise shall not of itself constitute such fixed place of business a permanent establishment of such enterprise. The fact that a corporation of one Contracting Party has a subsidiary corporation which is a corporation of the other Contracting Party or which is engaged in trade or business in the territory of such other Contracting Party (whether through a permanent establishment or otherwise) shall not of itself constitute that subsidiary corporation a permanent establishment of its parent corporation.

(2) For the purposes of Articles 6, 7, 8, 9, and 14 a resident of the United Kingdom shall not be deemed to be engaged in trade or business in the United States in any taxable year unless such resident has a permanent establishment situated therein in such taxable year. The same principle shall be applied, *mutatis mutandis*, by the United Kingdom in the case of a resident of the United States.

(3) In the application of the provisions of the present Convention by one of the Contracting Parties any term not otherwise defined shall, unless the context otherwise requires, have the meaning which it has under the laws of that Contracting Party relating to the taxes which are the subject of the present Convention.

Article 3

(1) A United Kingdom enterprise shall not be subject to United States tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the United States through a permanent establishment situated therein. If it is so engaged, United States tax may be imposed upon the entire income of such enterprise from sources within the United States.

(2) A United States enterprise shall not be subject to United Kingdom tax in respect of its industrial or commercial profits unless it is engaged in trade or business in the United Kingdom through a permanent establishment situated therein. If it is so engaged, United Kingdom tax may be imposed upon the entire income of such enterprise from sources within the United Kingdom : Provided that nothing in this paragraph shall affect any provisions of the law of the United Kingdom regarding the imposition of United Kingdom excess profits tax and national defence contribution in the case of inter-connected companies.

(3) Where an enterprise of one of the Contracting Parties is engaged in trade or business in the territory of the other Contracting Party through a permanent establishment situated therein, there shall be attributed to such permanent establishment the industrial or commercial profits which it might be expected to derive if it were an independent enterprise engaged in the same or similar activities under the same or similar conditions and dealing at

arm's length with the enterprise of which it is a permanent establishment, and the profits so attributed shall, subject to the law of such other Contracting Party, be deemed to be income from sources within the territory of such other Contracting Party.

(4) In determining the industrial or commercial profits from sources within the territory of one of the Contracting Parties of an enterprise of the other Contracting Party, no profits shall be deemed to arise from the mere purchase of goods or merchandise within the territory of the former Contracting Party by such enterprise.

ARTICLE 4

Where an enterprise of one of the Contracting Parties, by reason of its participation in the management, control or capital of an enterprise of the other Contracting Party, makes with or imposes on the latter, in their commercial or financial relations, conditions different from those which would be made with an independent enterprise, any profits which would but for those conditions have accrued to one of the enterprises but by reason of those conditions have not so accrued, may be included in the profits of that enterprise and taxed accordingly.

ARTICLE 5

(1) Notwithstanding the provisions of Articles 3 and 4 of the present Convention, profits which an individual (other than a citizen of the United States) resident in the United Kingdom or a United Kingdom corporation derives from operating ships documented or aircraft registered under the laws of the United Kingdom, shall be exempt from United States tax.

(2) Notwithstanding the provisions of Articles 3 and 4 of the present Convention, profits which a citizen of the United States not resident in the United Kingdom or a United States Corporation derives from operating ships documented or aircraft registered under the laws of the United States, shall be exempt from United Kingdom tax.

(3) This Article shall be deemed to have superseded, on and after the first day of January, 1945, as to United States tax, and on and after the 6th day of April, 1945, as to United Kingdom tax, the arrangements relating to reciprocal exemption of shipping profits from income tax effected between the Government of the United States and the Government of the United Kingdom by exchange of Notes dated August 11, 1924, November 18, 1924, November 26, 1924, January 15, 1925, February 13, 1925, and March 16, 1925, which shall accordingly cease to have effect.

ARTICLE 6

(1) The rate of United States tax on dividends derived from a United States corporation by a resident of the United Kingdom who

is subject to United Kingdom tax on such dividends and not engaged in trade or business in the United States shall not exceed 15 per cent.: Provided that such rate of tax shall not exceed five per cent. if such resident is a corporation controlling, directly or indirectly, at least 95 per cent. of the entire voting power in the corporation paying the dividend, and not more than 25 per cent. of the gross income of such paying corporation is derived from interest and dividends, other than interest and dividends received from its own subsidiary corporations. Such reduction of the rate to five per cent. shall not apply if the relationship of the two corporations has been arranged or is maintained primarily with the intention of securing such reduced rate.

(2) Dividends derived from sources within the United Kingdom by an individual who is (a) a resident of the United States, (b) subject to United States tax with respect to such dividends and (c) not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom surtax.

(3) Either of the Contracting Parties may terminate this Article by giving written notice of termination to the other Contracting Party, through diplomatic channels, on or before the thirtieth day of June in any year after the year 1945, and in such event paragraph (1) hereof shall cease to be effective as to United States tax on and after the first day of January, and paragraph (2) hereof shall cease to be effective as to United Kingdom tax on and after the 6th day of April, in the year next following that in which such notice is given.

Article 7

(1) Interest (on bonds, securities, notes, debentures, or on any other form of indebtedness) derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax on such interest and not engaged in trade or business in the United States, shall be exempt from United States tax; but such exemption shall not apply to such interest paid by a United States corporation to a corporation resident in the United Kingdom controlling, directly or indirectly, more than 50 per cent. of the entire voting power in the paying corporation.

(2) Interest (on bonds, securities, notes, debentures, or on any other form of indebtedness) derived from sources within the United Kingdom by a resident of the United States who is subject to United States tax on such interest and not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom tax; but such exemption shall not apply to such interest paid by a corporation resident in the United Kingdom to a United States corporation controlling, directly or indirectly, more than 50 per cent. of the entire voting power in the paying corporation.

ARTICLE 8

(1) Royalties and other amounts paid as consideration for the use of, or for the privilege of using, copyrights, patents, designs, secret processes and formulæ, trade-marks, and other like property, and derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax on such royalties or other amounts and not engaged in trade or business in the United States, shall be exempt from United States tax.

(2) Royalties and other amounts paid as consideration for the use of, or for the privilege of using, copyrights, patents, designs, secret processes and formulæ, trade-marks, and other like property, and derived from sources within the United Kingdom by a resident of the United States who is subject to United States tax on such royalties or other amounts and not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom tax.

(3) For the purposes of this Article the term ' royalties ' shall be deemed to include rentals in respect of motion picture films.

ARTICLE 9

(1) The rate of United States tax on royalties in respect of the operation of mines or quarries or of other extraction of natural resources, and on rentals from real property or from an interest in such property, derived from sources within the United States by a resident of the United Kingdom who is subject to United Kingdom tax with respect to such royalties or rentals and not engaged in trade or business in the United States, shall not exceed 15 per cent.: Provided that any such resident may elect for any taxable year to be subject to United States tax as if such resident were engaged in trade or business in the United States.

(2) Royalties in respect of the operation of mines or quarries or of other extraction of natural resources, and rentals from real property or from an interest in such property, derived from sources within the United Kingdom by an individual who is (a) a resident of the United States, (b) subject to United States tax with respect to such royalties and rentals, and (c) not engaged in trade or business in the United Kingdom, shall be exempt from United Kingdom surtax.

ARTICLE 10

(1) Any salary, wage, similar remuneration, or pension, paid by the Government of the United States to an individual (other than a British subject who is not also a citizen of the United States) in respect of services rendered to the United States in the discharge of governmental functions, shall be exempt from United Kingdom tax.

(2) Any salary, wage, similar remuneration, or pension, paid by the Government of the United Kingdom to an individual (other than a citizen of the United States who is not also a British subject) in

respect of services rendered to the United Kingdom in the discharge of governmental functions, shall be exempt from United States tax.

(3) The provisions of this Article shall not apply to payments in respect of services rendered in connection with any trade or business carried on by either of the Contracting Parties for purposes of profit.

Article 11

(1) An individual who is a resident of the United Kingdom shall be exempt from United States tax upon compensation for personal (including professional) services performed during the taxable year within the United States if (a) he is present within the United States for a period or periods not exceeding in the aggregate 183 days during such taxable year, and (b) such services are performed for or on behalf of a person resident in the United Kingdom.

(2) An individual who is a resident of the United States shall be exempt from United Kingdom tax upon profits, emoluments or other remuneration in respect of personal (including professional) services performed within the United Kingdom in any year of assessment if (a) he is present within the United Kingdom for a period or periods not exceeding in the aggregate 183 days during that year, and (b) such services are performed for or on behalf of a person resident in the United States.

[(3) *The provisions of this Article shall not apply to the compensation, profits, emoluments or other remuneration of public entertainers such as stage, motion picture or radio artists, musicians and athletes.*[1]]

Article 12

(1) Any pension (other than a pension to which Article 10 applies), and any life annuity, derived from sources within the United States by an individual who is a resident of the United Kingdom shall be exempt from United States tax.

(2) Any pension (other than a pension to which Article 10 applies), and any life annuity, derived from sources within the United Kingdom by an individual who is a resident of the United States shall be exempt from United Kingdom tax.

(3) The term ' life annuity ' means a stated sum payable periodically at stated times, during life or during a specified or ascertainable period of time, under an obligation to make the payments in consideration of money paid.

Article 13

(1) Subject to section 131 of the United States Internal Revenue Code as in effect on the first day of January, 1945, United Kingdom tax shall be allowed as a credit against United States tax. For this purpose, the recipient of a dividend paid by a corporation which is

[1] Paragraph 3 of Article 11 was deleted by a Protocol of June 6, 1946.

a resident of the United Kingdom shall be deemed to have paid the United Kingdom income tax appropriate to such dividend if such recipient elects to include in his gross income for the purposes of United States tax the amount of such United Kingdom income tax.

(2) Subject to such provisions (which shall not affect the general principle hereof) as may be enacted in the United Kingdom, United States tax payable in respect of income from sources within the United States shall be allowed as a credit against any United Kingdom tax payable in respect of that income. Where such income is an ordinary dividend paid by a United States corporation, such credit shall take into account (in addition to any United States income tax deducted from or imposed on such dividend) the United States income tax imposed on such corporation in respect of its profits, and where it is a dividend paid on participating preference shares and representing both a dividend at the fixed rate to which the shares are entitled and an additional participation in profits, such tax on profits shall likewise be taken into account in so far as the dividend exceeds such fixed rate.

(3) For the purposes of this Article, compensation, profits, emoluments and other remuneration for personal (including professional) services shall be deemed to be income from sources within the territory of the Contracting Party where such services are performed.

ARTICLE 14

A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets.

ARTICLE 15

Dividends and interest paid on or after the first day of January, 1945, by a United Kingdom corporation shall be exempt from United States tax except where the recipient is a citizen of or a resident of the United States or a United States corporation.

ARTICLE 16

A United Kingdom corporation shall be exempt from United States tax on its accumulated or undistributed earnings, profits, income or surplus, if individuals who are residents of the United Kingdom control, directly or indirectly, throughout the last half of the taxable year, more than 50 per cent. of the entire voting power in such corporation.

ARTICLE 17

(1) The United States income tax liability for any taxable year beginning prior to January 1, 1936, of any individual (other than a citizen of the United States) resident in the United Kingdom, or of any United Kingdom corporation, remaining unpaid on the date of

signature of the present Convention, may be adjusted on a basis satisfactory to the United States Commissioner of Internal Revenue: Provided that the amount to be paid in settlement of such liability shall not exceed the amount of the liability which would have been determined if—

(a) the United States Revenue Act of 1936 (except in the case of a United Kingdom corporation in which more than 50 per cent. of the entire voting power was controlled, directly or indirectly, throughout the latter half of the taxable year, by citizens or residents of the United States), and

(b) Articles 15 and 16 of the present Convention,

had been in effect for such year. If the taxpayer was not, within the meaning of such Revenue Act, engaged in trade or business in the United States and had no office or place of business therein during the taxable year, the amount of interest and penalties shall not exceed 50 per cent. of the amount of the tax with respect to which such interest and penalties have been computed.

(2) The United States income tax unpaid on the date of signature of the present Convention for any taxable year beginning after the thirty-first day of December, 1935, and prior to the first day of January, 1945, in the case of an individual (other than a citizen of the United States) resident of the United Kingdom, or in the case of any United Kingdom corporation shall be determined as if the provisions of Articles 15 and 16 of the present Convention had been in effect for such taxable year.

(3) The provisions of paragraph (1) of this Article shall not apply—

(a) unless the taxpayer files with the Commissioner of Internal Revenue on or before the thirty-first day of December, 1947, a request that such tax liability be so adjusted and furnishes such information as the Commissioner may require; or

(b) in any case in which the Commissioner is satisfied that any deficiency in tax is due to fraud with intent to evade the tax.

Article 18

A professor or teacher from the territory of one of the Contracting Parties who visits the territory of the other Contracting Party for the purpose of teaching, for a period not exceeding two years, at a university, college, school or other educational institution in the territory of such other Contracting Party shall be exempted by such other Contracting Party from tax on his remuneration for such teaching for such period.

Article 19

A student or business apprentice from the territory of one of the Contracting Parties who is receiving full-time education or training

in the territory of the other Contracting Party shall be exempted by such other Contracting Party from tax on payments made to him by persons within the territory of the former Contracting Party for the purposes of his maintenance, education or training.

ARTICLE 20

(1) The taxation authorities of the Contracting Parties shall exchange such information (being information available under the respective taxation laws of the Contracting Parties) as is necessary for carrying out the provisions of the present Convention or for the prevention of fraud or the administration of statutory provisions against legal avoidance in relation to the taxes which are the subject of the present Convention. Any information so exchanged shall be treated as secret and shall not be disclosed to any person other than those concerned with the assessment and collection of the taxes which are the subject of the present Convention. No information shall be exchanged which would disclose any trade secret or trade process.

(2) As used in this Article, the term 'taxation authorities' means, in the case of the United States, the Commissioner of Internal Revenue or his authorised representative; in the case of the United Kingdom, the Commissioners of Inland Revenue or their authorised representative; and, in the case of any territory to which the present Convention is extended under Article 22, the competent authority for the administration in such territory of the taxes to which the present Convention applies.

ARTICLE 21

(1) The nationals of one of the Contracting Parties shall not, while resident in the territory of the other Contracting Party, be subjected therein to other or more burdensome taxes than are the nationals of such other Contracting Party resident in its territory.

(2) The term 'nationals' as used in this Article means—

(a) In relation to the United Kingdom, all British subjects and British protected persons, from the United Kingdom or any territory with respect to which the present Convention is applicable by reason of extension made by the United Kingdom under Article 22; and

(b) In relation to the United States, United States citizens, and all persons under the protection of the United States, from the United States or any territory to which the present Convention is applicable by reason of extension made by the United States under Article 22;

and includes all legal persons, partnerships and associations deriving their status as such from, or created or organised under, the laws in force in any territory of the Contracting Parties to which the present Convention applies.

(3) In this Article the word 'taxes' means taxes of every

kind or description, whether national, federal, state, provincial or municipal.

Article 22

(1) Either of the Contracting Parties may, at the time of exchange of instruments of ratification or thereafter while the present Convention continues in force, by a written notification of extension given to the other Contracting Party through diplomatic channels, declare its desire that the operation of the present Convention shall extend to all or any of its colonies, overseas territories, protectorates, or territories in respect of which it exercises a mandate, which impose taxes substantially similar in character to those which are the subject of the present Convention. The present Convention shall apply to the territory or territories named in such notification on the date or dates specified in the notification (not being less than sixty days from the date of the notification) or, if no date is specified in respect of any such territory, on the sixtieth day after the date of such notification, unless, prior to the date on which the Convention would otherwise become applicable to a particular territory, the Contracting Party to whom notification is given shall have informed the other Contracting Party in writing through diplomatic channels that it does not accept such notification as to that territory. In the absence of such extension, the present Convention shall not apply to any such territory.

(2) At any time after the expiration of one year from the entry into force of an extension under paragraph (1) of this Article, either of the Contracting Parties may, by written notice of termination given to the other Contracting Party through diplomatic channels, terminate the application of the present Convention to any territory to which it has been extended under paragraph (1), and in such event the present Convention shall cease to apply, six months after the date of such notice, to the territory or territories named therein, but without affecting its continued application to the United States, the United Kingdom or to any other territory to which it has been extended under paragraph (1) hereof.

(3) In the application of the present Convention in relation to any territory to which it is extended by notification by the United Kingdom or the United States references to the 'United Kingdom' or, as the case may be, the 'United States' shall be construed as references to that territory.

(4) The termination in respect of the United States or the United Kingdom of the present Convention under Article 24 or of Article 6 shall, unless otherwise expressly agreed by both Contracting Parties, terminate the application of the present Convention or, as the case may be, that Article to any territory to which the Convention has been extended by the United States or the United Kingdom.

(5) The provisions of the preceding paragraphs of this Article

shall apply to the Channel Islands and the Isle of Man as if they were colonies of the United Kingdom.

ARTICLE 23

(1) The present Convention shall be ratified and the instruments of ratification shall be exchanged at Washington as soon as possible.

(2) Upon exchange of ratifications, the present Convention shall have effect—

(a) as respects United States tax, for the taxable years beginning on or after the first day of January, 1945;

(b) (i) as respects United Kingdom income tax, for the year of assessment beginning on the 6th day of April, 1945, and subsequent years; (ii) as respects United Kingdom surtax, for the year of assessment beginning on the 6th day of April, 1944, and subsequent years; and (iii) as respects United Kingdom excess profits tax and national defence contribution, for any chargeable accounting period beginning on or after the first day of April, 1945, and for the unexpired portion of any chargeable accounting period current at that date.

ARTICLE 24

(1) The present Convention shall continue in effect indefinitely but either of the Contracting Parties may, on or before the 30th day of June in any year after the year 1946, give to the other Contracting Party, through diplomatic channels, notice of termination and, in such event, the present Convention shall cease to be effective—

(a) as respects United States tax for the taxable years beginning on or after the first day of January in the year next following that in which such notice is given;

(b) (i) as respects United Kingdom income tax, for any year of assessment beginning on or after the 6th day of April in the year next following that in which such notice is given; (ii) as respects United Kingdom surtax, for any year of assessment beginning on or after the 6th day of April in the year in which such notice is given; and (iii) as respects United Kingdom excess profits tax and national defence contribution, for any chargeable accounting period beginning on or after the first day of April in the year next following that in which such notice is given and for the unexpired portion of any chargeable accounting period current at that date.

(2) The termination of the present Convention or of any Article thereof shall not have the effect of reviving any treaty or arrangement abrogated by the present Convention or by treaties previously concluded between the Contracting Parties.

5

EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM AND THE GOVERNMENT OF SYRIA CONCERNING THE SETTLEMENT OF PENDING CASES BEFORE THE SYRIAN MIXED COURTS.

Damascus, November 1–2, 1946

No. 1

His Majesty's Legation at Damascus to the Syrian Ministry for Foreign Affairs

British Legation,
Damascus, November 1, 1946

Sir,

His Majesty's Legation present their compliments to the Syrian Ministry for Foreign Affairs, and, on instructions from His Majesty's Government, have the honour to send their reply to the Ministry's Note No. S.151 of May 9, 1946,[1] on the subject of the Syrian Courts.

2. His Majesty's Government in the United Kingdom fully appreciate the desire of the Syrian Government to settle as soon as possible all the pending cases which had been begun before the Mixed Courts in May, 1945, and which have since been suspended, and at the same time they understand the point of view of the Syrian Government which is clearly set out in the Ministry's note under reply that, in the future, the administration of justice should be entrusted exclusively to magistrates of Syrian nationality. For these reasons, while not receding from the contention which they have always maintained that, on the abolition of the Mixed Courts, the Capitulatory Jurisdiction of British Consular Courts would in strict theory automatically revive until surrendered in a further agreement to be made between the two Governments, they note that the Syrian Government are not in agreement with this theory and, far from pressing their point of view, they are prepared to join with the Syrian Government in finding a practical and final solution which will give the fullest recognition to the independence of the Syrian judicature. His Majesty's Government have accordingly decided to withdraw the request made in the Legation's Note No. 85 of March 30, 1946,[1] for the appointment of neutral judges to terminate the cases pending before the Mixed Courts, and to suggest instead that these cases should be heard in the Syrian National Courts but that the judges before whom they would be argued, in all degrees of jurisdiction, should be Syrian magistrates

[1] Not reproduced. The notes here published contain all the terms of the Agreement.

who have had experience in the Mixed Courts and who will therefore be able finally to dispose of the cases on the basis of the existing pleadings and the interlocutory decisions already made, without the necessity of having them translated, thus ensuring continuity of procedure and jurisprudence. His Majesty's Government are convinced that the Syrian Government will agree that this is a fair and reasonable solution of the difficulty and will allow the cases to be settled with the minimum of delay and in the general interest.

3. As regards the juridical position of British subjects in Syria in the future, His Majesty's Government in the United Kingdom recognise that they will naturally come within the full jurisdiction of the National Courts. At the same time His Majesty's Government are confident that the Syrian Government will be prepared to adopt, with regard to their personal status, the rule which is adopted in the majority of countries, namely that their national law should be applied to them. It is true that, in the United Kingdom and nearly all other British territories for which His Majesty's Government in the United Kingdom are responsible, it is the law of the domicile rather than the law of the nationality which is applied for personal status cases. But the expression 'domicile' in English law has a very special meaning and is quite distinct from the conception of residence. 'Domicile' refers to the place which is deemed to be a man's permanent home as opposed to the residence which he may establish for even quite a long period elsewhere. Further, every person acquires at his birth as his domicile of origin the domicile of his parents and the English courts require such strict proof that the domicile of origin has been replaced by a new domicile of choice that it is comparatively rarely that they find that the domicile of origin has been so displaced. Consequently in fact the result is that, in the vast majority of cases, a Syrian national in the United Kingdom and the British territories referred to above will in fact be held to be domiciled in Syria and therefore in matters of personal status Syrian law would be applied to him by the courts. Acceptance of this principle would mean that with regard to all questions concerning marriage and conjugal rights, divorce, judicial separation, dowry, paternity, affiliation, legitimation, adoption, capacity of persons, majority, guardianship, trusteeship and interdiction, succession by will or on intestacy, distribution of estates, and settlements and in general family law, British subjects in Syria would be subject to their national laws, and if with respect to any of the said questions one of the parties should bring a matter before the Syrian Courts, the said Courts would have to apply the appropriate British laws. The competent British authorities will, of course, furnish to the Syrian Government, in case of need, the necessary information relative to such British laws.

4. His Majesty's Legation hope that the Ministry will be able

to communicate to them at an early date the consent of the Syrian Government to a practical solution of these outstanding juridical problems on the above lines.

His Majesty's Legation avail, etc.

Syrian Republic, Ministry of Foreign Affairs,
Damascus, November 2, 1946.

(*Translation*)

The Syrian Ministry of Foreign Affairs present their compliments to His Britannic Majesty's Legation and have the honour to reply to their note dated November 1, 1946, as follows :

The Syrian Government in the general interest and in order to avoid all unnecessary delay and expense in reaching a final decision of the cases pending before the Mixed Courts, are prepared, as an exceptional and temporary measure, to accept the suggestion contained in the Legation's note for their prompt disposal before Syrian magistrates with experience in the Mixed Courts.

As regards the personal status of British subjects in Syria, the Syrian Government are prepared to adopt the principle which is already admitted by the Syrian courts and which is considered as a principle of private international law recognised by the courts of the majority of countries, of the application in such matters of the national law of the person concerned. The Syrian Government have taken note of the statement of the position in England under English law as set out in the Legation's note, according to which in fact in the majority of cases in England the national Syrian law will be applied to determine questions of personal status concerning Syrian nationals owing to the special nature of the conception of the domicile as developed in the jurisprudence of the English courts.

The Syrian Ministry of Foreign Affairs avail, etc.

6

EXCHANGE OF NOTES BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM AND THE GOVERNMENT OF THE FRENCH REPUBLIC FOR THE SETTLEMENT OF DIFFERENCES REGARDING THE APPLICATION OF FRENCH NATIONALITY TO BRITISH SUBJECTS IN TUNISIA.

London, February 20, 1947

(1)

Mr. Bevin to M. Massigli

Foreign Office,
February 20, 1947.

Your Excellency,

Differences having arisen between His Majesty's Government in the United Kingdom and the Government of the French Republic

on the subject of the interpretation of the Agreement concluded by the exchange of notes of May 24, 1923,[1] relating to the application of French nationality to British subjects in Tunisia, discussions have taken place in London in the most amicable spirit between M. Noël Henry, Minister Plenipotentiary, Chef du Service Juridique of the French Ministry for Foreign Affairs, and Mr. W. E. Beckett, C.M.G., K.C., Legal Adviser of the Foreign Office, representatives of the two Governments.

2. In order to put an end to these differences, and at the same time to safeguard the rights of the persons concerned, I have the honour to inform your Excellency that my Government agree to the following proposals :—

(a) Applications for release from French nationality which have been already submitted to the French authorities by British subjects born in Tunisia before November 8, 1921, will be granted not later than June 30, 1947, without any charge being imposed on the applicants.

(b) Any British subject born in Tunisia on or after November 8, 1921, whose father or mother, or both of whose parents, were born in Tunisia, and all or any of whose grandparents, other than the paternal grandfather, were also born in Tunisia, shall have the right to apply to be released from French nationality.

(c) Any British subject born in Tunisia on or after November 8, 1921, whose father or mother, or both of whose parents, were born in Tunisia, and none of whose grandparents were born in Tunisia, shall have the right to apply to be released from French nationality, provided he has not passed his 22nd year without making any application to exercise this right, which he has always possessed under French law.

(d) Applications already submitted to the French authorities by persons coming under the provisions of (b) and (c) will be granted not later than June 30, 1947, without any charge being imposed on the applicant.

(e) In cases where applications coming under the provisions of (b) and (c) have not been already submitted to the French authorities, these applications must be presented before December 31, 1947, (i) by the applicant personally, without the necessity of the authorisation of any other person, if the applicant has attained the age of 21 years, or, (ii) if the applicant has not attained this age, by his or her legal guardian acting on his behalf. The applications shall be granted not later than six months from the date of their deposit without any charge being imposed on the applicants.

[1] ' Treaty Series No. 11 (1923) ', Cmd. 1899.

If the legal guardian fails to exercise the right on behalf of the applicant, it is understood that the applicant will be debarred from declining French nationality in the year following his attainment of the age of majority.

(f) Any person who has served in the British armed forces shall be entitled to benefit by the provisions of (b), (c) and (e), even if born in Tunisia before November 8, 1921, and even if he has passed his 22nd year without making any application.

(g) When any person is entitled to benefit from the provisions of (a)–(f) above, his application shall not be refused on the ground that one or both of his parents has previously declined or been released from French nationality.

(h) The present Agreement replaces the Agreement of May 24, 1923. It is nevertheless understood that no attempt will be made to impose Tunisian nationality instead of French nationality on British subjects in Tunisia.

3. If the French Government likewise agree to the foregoing proposals, I have the honour to suggest that the present note and your Excellency's reply to that effect be regarded as constituting an agreement between the two Governments on this subject which shall take effect immediately.

I have, etc.,
(Signed) ERNEST BEVIN.

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